(1)

Supreme Court, U.S.
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No. 08-1421

In the Supreme Court of the United States

BURR E. LEE, JR. AND RUTH C. LEE SELF-DECLARATION OF TRUST NO. 10331J,

RICHARD A. VAN AUKEN, TRUSTEE, PETITIONER

v.

CATRON, CATRON & POTTOW, P.A.,

FLETCHER R. CATRON, ESQ., AND

KAREN AUBREY, ESQ., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW MEXICO COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

RICHARD A. VAN AUKEN, TRUSTEE
pro se

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QUESTIONS PRESENTED

Question No. 1

Whether an individual nonattorney fiduciary such as an individual nonattorney trustee of a common law express trust is engaged in the practice of law without statutory authority when the fiduciary represents and binds the equitable interests of others such as trust beneficiaries.

Question No. 2

Whether an individual nonattorney trustee's Constitutional rights to equal protection and due process have been violated by New Mexico courts when, in addressing the trustee's claims against court-licensed New Mexico lawyers, the courts allow the trustee-retained lawyers filing these claims to withdraw, then dismiss these claims for lack of counsel, and, finally, on appeal, fashion *ad hoc* case law to sustain the dismissal of the claims.

PARTIES TO THE PROCEEDING

Petitioner is Richard A. Van Auken, Trustee of the Burr E. Lee, Jr. and Ruth C. Lee Self-Declaration of Trust No. 10331J. Respondents are Catron, Catron & Pottow, P.A. (including as successor to Catron, Catron & Sawtell, P.A.); Fletcher R. Catron, Esq.; and Karen Aubrey, Esq.

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In the Supreme Court of the United States

RICHARD A. VAN AUKEN, TRUSTEE, PETITIONER

v.

CATRON, CATRON & POTTOW, P.A.,
FLETCHER R. CATRON, ESQ., AND
KAREN AUBREY, ESQ., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW MEXICO COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

Richard A. Van Auken, Trustee of the Burr E. Lee, Jr. and Ruth C. Lee Self-Declaration of Trust No. 10331J, respectfully petitions this Court for a writ of certiorari to review an *Opinion* of the New Mexico Court of Appeals.

OPINIONS BELOW

The *Opinion* of the New Mexico Court of Appeals (Pet. App. 1a-4a) is currently reported at *Lee v. Catron,* 2009-NMCA-018,__N.M.__,__P.3d__[1]. The *Order* of the New Mexico Supreme Court denying trustee's petition for writ of certiorari (Pet. App. 36a) and its *Order* denying trustee's motion for rehearing (Pet. App. 37a) are not reported.

JURISDICTION

The state appellate court's opinion was entered on September 16, 2008 and an order denying the trustee's motion for appellate rehearing was entered on October

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[1] Also accessible at *Lee v. Catron* , 2009-NMCA-018 through internet search engines such as Ask, Clusty, Google, Live or Yahoo.

21, 2008. The state supreme court's order denying trustee's petition for writ of certiorari was entered on December 30, 2008 and its order denying trustee's motion for rehearing was entered on February 13, 2009. The jurisdiction of this Court is invoked through 28 U.S.C. §1257(a) for rights and privileges claimed under United States statutes and the Constitution.

STATUTORY AND CONSTITUTIONAL PROVISIONS

Section 1654 of the U.S. Code, Judiciary and Judicial Procedure - 28 U.S.C. §1654, Appearance personally or by counsel - is set out in the petition appendix (Pet. App. 39a).

Parts of four sections of New Mexico Statutes Annotated 1978 are set out in the petition appendix: Attorneys: NMSA 36-2-17, Attorney deceit or collusion (Pet. App. 39a), the Declaratory Judgment Act: NMSA §44-6-02, Scope, NMSA §44-6-04, Power to Construe, and NMSA §44-6-14, Construction (Pet. App. 39a, 40a); the Uniform Probate Code: NMSA §45-1-102, Purposes of act and §45-1-106A, Effect of fraud or evasion (Pet. App. 40a); and the Uniform Trust Code: NMSA §46A-3-303, Representation by fiduciaries and parents (Pet. App. 40a).

Section 1 of Amendment XIV to the United States Constitution (equal protection, due process) is set out in the appendix (Pet. App. 41a). Amendment V to the Constitution (due process) is also set out in the petition appendix (Pet. App. 41a).

STATEMENT

Through this *Petition*, the trustee of a common law express trust, a nonattorney natural person, seeks review of an *ad hoc* state court opinion for the purpose of establishing trustee's right in state courts to personally conduct his own cases involving trust property. The state court appellate opinion upholds district court dismissals of trustee's *pro se* claims against licensed attorneys.

After removing trust-as-entity grounds used by the district court to dismiss trustee's *pro se* claims (Pet. App. 2a, ¶¶2,3), the New Mexico Court of Appeals, in its *Opinion* of September 16, 2008, provides new grounds for upholding the district court dismissal of trustee's *pro se* claims against the attorneys: fiduciaries such as the trustee need to appear in court through counsel (*Id*, 3a; ¶¶4,5).

Petitioner-Trustee acknowledges that the appellate body has the power to make such special purpose law but presents this *Petition* because, by ruling in this way to bar valid claims of the trustee, the court unequally protects attorneys who enabled a serious breach of trust. The newly crafted appellate holding that fiduciary duty to others requires a person to litigate through licensed counsel is presented in this *Petition* as ***conflicted*** within existing statutes and established practice. The *Petition* also presents the *ad hoc* nature of the holding as an open demonstration of a seven-year pattern of state court action ***infringing*** Constitutional rights of the trustee.

The appellate ruling in this Case, *Lee v. Catron*, 2009-NMCA-018 (Pet. App. 1a-4a), affects all New Mexico fiduciaries including trustees, personal representatives, conservators, guardians, financial advisors and others. It has practical effects way beyond the limited trust enforcement scope of this Case. Moreover, the effects of the appellate ruling in this Case are perverse, the opposite of what is proper. Instead of protecting trustees' rights and equity interests of beneficiaries, the requirement for trustees to appear through counsel protects attorneys against trustees' claims and damages the beneficiaries.

Question #1 presented herein seeks review of conflicted law; Question #2 seeks a determination of Constitutional violations. Both questions address the judicial standing of an individual *pro se* trustee of a common law express trust.

The summary factual chronology for this Case which supports this *Petition* is as follows:

(i) just prior to a generational change of trustee - and with the aid of licensed trust and estate attorneys - a common law express trust is breached and valuable family property and land inherited from Ernest Thompson Seton is transferred to a hospice nurse;

(ii) the next generation trustees, who undertake to correct the breach and recover the property, find themselves in a seven-year, four-case legal contest with trust and estate attorneys including those who enabled the breach;

(iii) action taken by the district court in the four cases over seven years (a) repeatedly fails to review and finally construe the trust instrument, trustee's basis for proving the breach, (b) arbitrarily bars trustee's *pro se* claims on the unsettled basis that the trust "entity" requires "its" trustee to appear through licensed counsel, and (c) contributes to trustee's lack of counsel by allowing the withdrawal of trustee-retained counsel in three of the four cases and by enabling intimidation of other attorneys dissuading them from entering for trustee;

(iv) appellate review consolidating appeals of district court dismissals in the third case uses two calendar notices to (a) make dismissal orders non-final pending final ruling on trust construction and then, in the second notice, (b) to uphold dismissal of trustee's claims on grounds that a common law express trust is an artificial legal entity which, in accordance with settled New Mexico law in *Martinez v. Roscoe*, 2001-NMCA-083, cannot appear in state courts except through licensed counsel;

(v) in addressing the trustee's claims against court-licensed New Mexico attorneys in this (fourth) Case the district court allows trustee-retained lawyers filing these claims to withdraw and then dismisses the claims for lack

of the withdrawn counsel after which, on appeal, a second panel of appellate judges (a) rules that a common law express trust is *not* an artificial legal entity thereby rejecting *Martinez as relevant* but (b) upholds dismissal of trustee's *pro se* claims on new grounds that the trustee's fiduciary duty to others (the beneficiaries) bars *pro se* appearances because in representing the beneficiaries' interests in court, the trustee is engaging in the unauthorized practice of law; and

(vi) as a result of this continued bar to state court access the trustee is presently (a) unable to plead or conduct his own case regarding his personal ownership of contested property in the trust estate, (b) dependent on generally unwilling members of the New Mexico State Bar to further pursue the interests of the trust beneficiaries in New Mexico, and (c) only able to properly discharge his duty of loyalty to the trust instructions in this Case by presenting this *Petition* in order to regain access to New Mexico courts.

The related seven-year chronology of action in New Mexico courts includes a probate proceeding in 2002, *In Re Burr E. Lee Jr.*; a property recovery proceeding against the hospice nurse in 2003, *Alexander et al. v. Harrison*; a statutory suit against four attorneys for probate fraud, attorney deceit and collusion in 2006, *Van Auken v. Catron et al.*; and this Case from 2007, *Lee v. Catron, et al.*, an attorney malpractice and fraud action against a law firm and two attorneys. *See* Table of New Mexico Court Actions on page XI. This Case, *Lee*, and its predecessor case, *Van Auken*, are still active. [A related fraud and conspiracy case, *Seton et al. v. Wirth et al.* (2008) was filed subsequent to the appeal in this Case and as of May 2009 has action pending in district court.]

The extensive record supporting this Case provides a unique opportunity to review the rights and powers of

individual fiduciaries and the particular legal and equitable rights of individual real property owners that may be asserted in protecting personal property title and equity against improper manipulation by more organized, better informed interests of licensed trust and estate attorneys.

Case History: Lee v. Catron et al. (2007)

The Petitioner in this Case retained New Mexico attorneys who entered claims in May 2007 against other New Mexico attorneys alleging attorney malpractice and fraud for deceitfully construing the trust instrument, for improperly arranging transfer of valuable real property from the trust estate to a hospice nurse, for conflicted opposition to the successor trustee in the probate case which followed, and for obstruction of the successor trustee's efforts to recover the property in probate and subsequent proceedings.

However, the trustee-retained attorneys were allowed to withdraw shortly after filing this *Lee* Case and Petitioner involuntarily became *pro se*. The district court then dismissed the claims of the *pro se* trustee, the trustee appealed and the appellate court reviewed the dismissal, a series of events identical in every respect to court action in *Van Auken* - identical except that the appellate court removed the trust-as-entity grounds used by the trial court for both dismissals. The appellate ruling still upheld the dismissals for lack of counsel, but on completely new grounds created by the court and had never been argued by the parties. Counsel was required in *Van Auken,* because the trust is an "entity;" now in *Lee*, because the trustee/fiduciary "represents" "others."

This appellate ruling in *Lee* upsets standard practice in each of the thirty-three county probate courts in New Mexico where official state instructions direct personal representatives of estates in *pro se* use of probate forms, one example of the conflicted nature of the ruling. The

ruling makes no sense until viewed in the context of the seven year, four-case experience of the trustee in this Case. The ruling protects attorneys involved in the breach of trust and is the most recent action in a sequence of eighteen separate actions by New Mexico courts protecting defendant-attorneys and infringing trustee's legal and Constitutional rights. Subsections below detail conflicted case law and eighteen infringing actions.

Appended to this *Petition* are facts which include (i) three appellate court rulings in this *Lee* Case (Pet. App. at 1a, 5a, 38a); (ii) three appellate court opinions in the predecessor *Van Auken* case (Pet. App. at 11a, 17a, 22a); (iii) seven entries presenting the referenced statutory and Constitutional provisions (Pet. App. at 39a[3], 40a[2], 41a[2]); (iv) the trust instrument and four documents demonstrating its construction and evident violation (Pet. App. at 42a, 52a, 55a, 57a, 67a); (v) two writings prepared by attorneys demonstrating their conflicted positions (Pet. App. at 54a, 66a); (vi) a sequence of nine district court rulings which, supported by the appellate record above, unequally protect the defendant-attorneys infringing trustee's Constitutional rights (Pet. App. at 7a, 9a, 27a, 29a, 30a, 31a, 33a, 34a, 35a) and (vii) excerpts from twenty-eight separate pleadings between October 2004 and January 2009 which document the evolving state of argument in the sequence of rulings (Pet. App. at 69a et seq.). Oral pleadings from three hearing transcripts in this last group show significant hearing decisions made by the district court (Pet. App. at 70a, 76a, 84a).

Lee v. Catron, 2009-NMCA-018 (Conflicted Case Law)

The *Opinion* of the New Mexico Court of Appeals in this Case (Pet. App. 1a-4a) is conflicted case law fashioned to provide legal protection to attorneys sustaining dismissal of trustee's claims on grounds never previously asserted by the respondents or raised in previous district court proceedings

in this Case or in any of three predecessor cases. The appellate ruling in *Van Auken* (Pet. App. 11a-16a) of June 27, 2008 views a common law express trust as an artificial legal entity, relies on *Martinez v. Roscoe* for denying judicial standing to *pro se* trustees, and makes no connection to *pro se* trustee's fiduciary duty. The new fiduciary-based need for counsel appears for the first time in the appellate court's *Notice of Proposed Summary Disposition* entered in *Lee* on July 23, 2008. See Pet. App. 5a, 6a.

The specific citations for this new fiduciary-based need for counsel are *Chisholmn v. Rueckhaus,* 1997-NMCA-112, ¶6, 124 N.M. 255, 948 P.2d 707 (holding that a parent bringing an action on behalf of a child must be represented by counsel) and *Steele v. McDonald,* 202 S.W.3d 926, 928 (Tex. App. -Waco 2006) (citing cases from sister states disallowing *pro se* represention of an estate by a personal representative) (Pet. App. 6a).

Prior to this July 23, 2008 *Notice* no attention was paid to how a trustee was similar to a parent or to a personal representative of an estate. A trust was an entity. What happened to produce new thinking?

Setting forth identities and positions of attorneys in this Case and the predecessor case is important to this *Petition.*

Fletcher R. Catron, a defendant in both *Lee* and *Van Auken* is a partner in a century-old Santa Fe family law firm. New Mexico has a Catron County and the physical address of the district courthouse in Santa Fe is 100 Catron Street. The Catron family firm, Catron, Catron & Pottow, P.A., also a defendant in this Case, was Catron, Catron & Sawtell, P.A. prior to April 1, 2003.

Peter F. Wirth, a defendant in *Van Auken,* is a local state legislator with committee assignments involving the courts and the law. Mr. Wirth was a lawyer at Catron, Catron & Sawtell, P.A. from 1992 to 1994 and after April

1, 2003, has partnered with other lawyers who moved from Catron, Catron, & Sawtell, P.A., to form the firm of Sawtell, Wirth & Biedscheid, P.C. Mr. Wirth has served as "special master" in one or more large cases in the First Judicial District Court.

Both Mr. Wirth and Mr. Catron actively participate in legislative changes to trust and estate law promulgated by Uniform State Law commissioners. During the 2009 New Mexico legislative session, State Senator Wirth introduced Senate Bill 497, a measure to amend New Mexico Probate Code and Trust Code. Mr. Catron was designated by the State Bar Section on Real Property, Trust and Estate Law to manage passage of the bill. Mr. Catron previously served as chairman of that section (Pet App. 69a, A. ¶1).

Karen Aubrey, an independent lawyer in private practice in Santa Fe, is a defendant in this Case and the predecessor *Van Auken* case.

William Gilstrap, an independent lawyer in private practice in Albuquerque, who withdrew from this Case very shortly after filing it, shares office space and works closely with the New Mexico Trial Lawyers Association.

So what happened between the June 27, 2008 appellate ruling in *Van Auken* and the September 16, 2008 appellate ruling on the exact same issue in *Lee*?

The short answer to that question is that conflicted case law requiring attorneys for fiduciaries was created by the New Mexico Court of Appeals to uphold dismissal of trustee's claims in this Case.

This *Petition* challenges this case law by showing contrary wording in both federal and local statutes and in citations from non-conforming state instructions to fiduciaries. At the very end, this *Petition* suggests that the perverse effects of the current ruling can be eliminated by letting trustees hold attorneys to account and beneficiaries hold trustees to account.

Entirely apart from the conflicted nature of the appellate ruling in this case, this *Petition* argues that its *ad hoc* nature reveals it as the latest in the sequence of eighteen judicial actions providing unequal protection to attorneys at trustee's expense **infringing** equal protection of trustee's property rights by denying due process in the taking of valuable property from the trust estate.

This *Petition* seeks enforcement of Petitioner-Trustee's rights under two amendments to the Constitution challenging both the newly fashioned case law in *Lee* and the sequence of state court rulings which over four cases since 2002 have denied trustee final judicial construction of the trust and denied trustee access to the courts on the related claims.

Evident Breach of Trust (Infringing Construction)

In nine instances in one portion of the sequence of **infringing** district court actions, enforcement of the trust instrument is suppressed benefiting the attorney-defendants who, throughout all four trustee cases, possessed the knowledge that a breach of trust had been aided and abetted by one or more of their colleagues and/or co-defendants.

The factual chronology behind this vital issue of the breach of trust is as follows:

(i) language in the six-page trust instrument hasn't changed since 1979 (Pet. App. 42a-51a);

(ii) knowledgeable about trust language, the Catron defendants prepare, witness and file a deed transferring valuable property (family home) to a hospice nurse breaching terms set forth in the trust instrument (Pet. App. 52a-53a);

(iii) trust expert James F. Beckley, Esq. of Albuquerque, N.M. analyzes the trust instrument and testifies that the breach occurred and that defendants Catron and

Aubrey knew or should have known this when each separately advised the trustee (Pet. App. 57a-65a); and

(iv) the original author and witness to 1979 execution of the trust instrument, Wisconsin attorney William J. Joost, fully corroborates Mr. Beckley's testimony (Pet. App. 67a-68a).

As summarized in the *Docketing Statement* for one appeal in *Van Auken* (Pet. App. 97a), Respondents acted as follows:

(i) Fletcher R. Catron and the law firm of Catron, Catron & Sawtell P.A. covered up this breach in a 2002 probate proceeding (Pet. App. 84a-86a) after advising, aiding and abetting the trustee in 2000 when the breach occurred (Pet. App. 52a-53a; 55a-56a) by entering the probate proceeding in conflicted opposition to trustee (Pet. App. 54a; 35a); and

(ii) Karen Aubrey, hired by trustee to recover trust property in opposition to Mr. Catron, withdrew from the same probate proceeding, *In Re Burr E Lee Jr* (2002), in early 2003 rather than reveal this breach of trust and the conflicted representation of Mr. Catron (Pet. App. 35a).

The seriousness of the breach and the conflicted representation amply explain why, in four separate cases spanning seven years since 2002, the trustee has been unable to obtain, from New Mexico courts, final judicial construction of the trust instrument.

The first portion of the infringing sequence of district court rulings is detailed below in nine separate court actions on the now-evident breach of trust, at first suppressing its existence, then failing to construe the trust instrument as needed to demonstrate the breach, and finally avoiding final construction by denying trustee judicial access:

¶1.1 *Breach of Trust Supressed During Probate*: Throughout *In Re Burr E Lee Jr* (2002), the trustee did not know the trust had been breached, because retained counsel (Aubrey) withheld that information and the court allowed her to withdraw without raising the issue (Pet. App. 35a). Mr. Catron also withheld this knowledge informing the trustee that the property transfer was allowed (Pet. App. 84a-86a).

¶1.2 *Court Hears Authority for Nurse, Bars Authority for Trustee*: In a post-probate action, *Alexander et al. v. Harrison* (2003), against the hospice nurse (titleholder of former trust property), trustee's (new) counsel learned of the breach of trust from advice by attorneys Beckley and Joost but a court order barred their testimony prior to a finding of ambiguity (Pet. App. 34a). In June 2004, trustee's counsel filed *Plaintiff's Rule 1-056 Motion for Summary Judgment that the Transfers of the Seton and Timberwick Properties were Unlawful* asking for court construction of the trust instrument. In responding Mr. Wirth, the nurse's personal attorney, submitted authoritative legal opinion from Fletcher Catron stating that there had been no breach (Pet. App. 69a). [In probate, Mr. Wirth had represented the hospice nurse's personal interest in the former trust property.]

¶1.3 *District Court Fails to Construe Trust Instrument*: Ignoring trustee's right under NMSA §§44-6-02, 04, and 14 (Pet. App. 40a) to court construction of a "writing" and in contravention of intent in the court's own order (Pet. App. 34a), no consideration was given to trustee's motion to construe. Instead the court granted dismissal of trustee's claims "with prejudice at plaintiffs' cost" apparently punishing trustee for attempting to assert a right to contract construction (Pet. App. 39a).

¶1.4 *District Court Fails to Sanction Defense Violation*: The district court treated Mr. Wirth's flagrant

introduction of extrinsic evidence as if nothing of any consequence had occurred (Pet. App. 33a).

¶1.5 *Court Supports Undue Legal Pressure on Trustee*: Prior to an appeal deadline, the district court scheduled an expedited hearing on attorney fees as Mr. Wirth was advising trustee through counsel of *personal* liability for the costs. Under duress the trustee settled with the nurse arranging to "repurchase" improperly transferred Seton land from the nurse for an amount covering the nurse's attorney fees with Mr. Wirth. Absent trust construction, this settlement agreement was fraudulently obtained by opposing counsel likely aware of breach (Pet. App. 55a-56a).

¶1.6 *Claims Dismissed Prior to Trust Construction*: In 2006, the Petitioner, replacing his sister, assumed successor trustee duties and, *pro se*, sued the lawyers for statutory violations including probate fraud, attorney deceit and collusion. See summary of *Van Auken case* in the *Docketing Statement* for appeal of trust language ruling (Pet. App. 90a-96a). In launching *Van Auken,* trustee concentrated on finally construing the trust instrument under restrictions imposed by existing order. After the complaint, trustee filed *Plaintiff's Rule 1-056 Motion that Trust Terms were Violated by Property Removal,* a second attempt to finally construe the trust as irrevocable. Responding to many defense motions prior to hearing, trustee moved to establish priority for trust construction making the breach a fact prior to review of the dismissal motions as allowed under procedural rules for "failure to state a claim" defense. The district court, however, reviewed and granted three dismissal motions before addressing trust construction (Pet. App. 76a, §A). [The appellate court, in a *Calendar Notice*, would later make these dismissals "non-final." Pet. App. 25a, lines 25-32]

¶1.7 *Trust Ruled Ambiguous, Motion Title Changed*: The court ruled the trust to be ambiguous because it had

more than one plausible interpretation. The order was characterized as "partial" (non-appealable) in the title (Order: Pet. App. 30a).

¶1.8 *Further Review of Trust Instrument Denied*: After the "ambiguity" ruling, in accord with the court's earlier order (Pet. App. 34a), the expert testimony of Mr. Beckley was arranged and entered (Pet. App. 57a-65a) and later, the corroboration of Mr. Joost (Pet. App. 67a-68a). Mr. Beckley authoritatively establishes the trust instrument as unambiguous, that it became irrevocable in 1992, that the property transfer of 2000 violates its terms, and that Ms. Aubrey and Mr. Catron knew or should have known this. The district court denied a motion to review the trust considering Mr. Beckley's testimony keeping alive Mr. Catron's written opinion of the trust as revocable except "for successor beneficiaries" (Pet. App. 55a, ¶2).

¶1.9 *Appellate Court Shifts to Pro Se Defense*: The appellate *Calendar Notice* recognized the need to construe the trust by making three appealed final dismissals "non-final" until the trust was "properly reviewed" (Notice: Pet. App. 25a, lines 25-32). However, instead of ruling on this basis, the appellate court issued a second *Calendar Notice* denying trustee access to the courts because the trust was an "entity" requiring licensed representation (Pet. App. 17a-21a) and eventually so ruled (Pet. App. 11a-16a).

Although there appears to be an excellent *prima facie* showing for breach of trust from the trust instrument and a Warranty deed, the state courts of New Mexico, in the above sequence of nine separate actions have avoided such determination unequally protecting defendant-attorneys infringing trustee's rights.

Bar Intimidation (Infringing Court Access)

The other portion of the sequence of **infringing** district court actions shows nine instances where misdeeds of and claims against defendant-attorneys have been suppressed

by professional intimidation of trustee's counsel and arbitrary dismissal of trustee's claims.

The factual chronology behind this suppression and intimidation are as follows:

(i) the six-page trust instrument is drafted and witnessed by Mr. Joost in 1979 (Pet. App. 42a-51a);

(ii) conditions attached to a breach of trust are known to members of the Catron law firm in 2000 since these conditions - trust interpretation, trust revisions, Burr Lee's new *Will*, Ms. Harrison's designation as Personal Representative, and the transfer of trust property to her - were determined by legal actions of the Catron firm (Pet. App. 52a-53a); and

(iii) upon the death of Burr E. Lee, Jr. in 2002 and the generational change in trustee, the conditions attached to the breach come under the jurisdiction of the district court in Santa Fe, a jurisdiction familiar to the Catron firm.

The city of Santa Fe is New Mexico's state capitol, has 4% of the state's two million people and is home to the state legislature and 15% of the state's 6,000 practicing attorneys. Estate planning and administration are a significant part of legal activity in Santa Fe, intensely local and sometimes characterized as "this unique probate world" (Pet. App. 70a). Probate rulings are not appealable to the federal level, but judicial decisions affecting the rights of individual fiduciaries are.

The role of local attorneys in breaching the trust amply explains why retaining and keeping trustee's counsel has been difficult in Santa Fe and why, once the issue of breach was forcefully raised, trustee's *pro se* judicial standing was attacked and curtailed.

Nine separate court actions comprise **the second portion of the infringing sequence of district court rulings** below:

¶2.1 *Probate Case Attorney Withdrawal*: Trustee retained Ms. Aubrey in the 2002 probate case opposing Mr. Catron and the Catron firm representing the Estate of Burr E. Lee, Jr., Ms. Harrison[2] Personal Representative (Pet. App. 35a). When Ms. Aubrey was asked to question Mr. Catron about advice he had given to the decedent regarding the trust, she moved for and quickly obtained court-granted permission to withdraw Mr. Catron approving (Pet. App. 35a). Without explanation, the trustee became involuntarily *pro se*. Ms. Aubrey is a defendant in this Case and in the predecessor *Van Auken* case.

¶2.2 *Post-Probate Case Intimidation*: In 2003 a southern New Mexico attorney, Jon Diener, retained to recover the trust property from the hospice nurse, entered a motion to construc the trust. However, after being barred by court order (Pet. App. 34a) from introducing authoritative testimony of attorneys Beckley and Joost, he saw the court allow the nurse's attorney, Mr. Wirth, violate the order by introducing authoritative testimony stating that trust terms allowed property transfer (Pet. App. 69a). The violation went unpunished by the court which instead sanctioned Mr. Diener under local rule LR 1-306(C) for submitting a lengthy pleading (Pet. App. 33a, ¶4). [Mr. Diener no longer practices law.]

¶2.3 *Trust-as-Entity Dismissal in Van Auken Case*: In early 2007 as trust construction became established by *pro se* argument and authoritative testimony of Mr. Beckley, attorney pleadings and court rulings appeared

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[2] Marie Harrison had been the hospice nurse caring for Ruth C. Lee at her death in 1992.

for dismissing trustee's claims for lack of counsel. The legal basis for dismissal was that, as an artificial legal entity, like a corporation, the trust must appear in court through an attorney. Until the 2008 appellate *Opinion* in this Case, the operative trust-as-entity case law was that supplied by Mr. Catron in August 2006: *Martinez v. Roscoe* (Pet. App. 71a). Facing dismissal, trustee engaged in a full-time search for counsel and discovered an unwillingness in many attorneys to even discuss the case (Pet. App. 77a, ¶2).

¶2.4 *Court Discourages Attorneys from Suing Other Attorneys*: In the course of seeking to retain attorneys from Santa Fe, trustee was told more than once that suits against other practicing attorneys in Santa Fe were unwelcome (Pet. App. 79a, 80a, ¶4). Mr. Beckley attested to his unwillingness to enter the case (Pet. App. 83a).

¶2.5 *Trustee-Retained Attorneys Allowed to Withdraw from Van Auken and Lee Cases*: Pressures on attorneys retained by trustee in March 2007, William Gilstrap and Daymon Ely, mounted in May 2007 after their first court appearance on trustee's behalf in *Van Auken* (Pet. App. 84a, §A) and their filing of this *Lee* Case. They moved to withdraw in June 2007 in the midst of several conflicting legal actions: dismissal of statutory claims for attorney deceit (Pet. App. 85a, 86a, §D), court-ordered amended complaint in *Van Auken*, trust motion to intervene as an entity with attorneys (Pet. App. 88a), initial answer to claims in *Lee*, and trustee's *pro se* docketing of five appeals in *Van Auken* (Pet. App. 90a, 97a). Mr. Gilstrap's concern was claims against Mr. Wirth (in *Van Auken*). Mr. Beckley's concern was the ambiguity ruling. Each concern involved a separate appeal which by August 2007, the appellate court had consolidated (Pet. App. 22a). An arrangement between trustee and counsel to separately pursue new claims (through counsel) and the consolidated appeals (*pro se*) was rejected by the court at a hearing on

September 21, 2007, forcing attorneys Gilstrap and Ely to withdraw their previously-filed *Notice* withdrawing their motion to withdraw (Pet. App. 66a).

¶2.6 *Appellate Court Ignores Argument by Both Sides That Trust is Not an Entity*: An odd feature of the motion to intervene filed by Mr. Gilstrap on behalf of the trust (entity) was that Mr. Catron's response set out a full array of authorities establishing that the trust was *not* an entity and that the proper legal entity in these judicial proceedings is the trustee, the owner of trust property (Pet. App. 88a 89a). The appellate panel had these defense pleadings alongside trustee's similar pleadings but, regardless, proposed dismissal on a trust-as-entity basis. The final appellate opinion in Van Auken states that district court dismissal of the motion to intervene was based on withdrawal of counsel (Pet. App. 13a, ¶2, lines 4-6) ignoring Mr. Catron's pleading that the trust (entity) was not the real party of interest (Pet. App. 89a, §D).

¶2.7 *Appellate Court Upholds Dismissal of Trustee's Claims in Van Auken on Trust-as-Entity Grounds:* In ruling for summary dismissal of trustee's claims in the consolidated *Van Auken* appeal, the appellate court based its opinion on *Martinez v. Roscoe* (Pet. App. 14a, ¶1).

¶2.8 *District Court Dismisses Lee on Trust-As-Entity Grounds:* As the consolidated *Van Auken* appeal was underway, at a February 2008 district court hearing in this *Lee* Case the trustee's claims, which had involuntarily become *pro se*, were dismissed by the district court for lack of counsel citing the same grounds as dismissal in *Van Auken* (Pet. App. 7a, 114a; See: Argument IV in each).

¶2.9 *Appellate Court Rejects Trust-As-Entity Grounds, Creates New Fiduciary-Other Grounds for Dismissing Trustee:* Recognizing the trustee's docketing argument that the trust is not an entity but not recognizing the trustee's argument that a fiduciary duty is a personal interest (Pet.

App. 121a, ¶¶ 1,2), the appellate court overturned the basis of the district court dismissals in *Van Auken* and *Lee* (Pet. App. 2a, ¶¶ 2,3) but sustained the dismissal of trustee's claims anyway based on new attorney requirements for fiduciaries (Pet. App. 3a, ¶¶ 4,5).

The above sequence of court actions from the district court record is consistent with professional intimidation of attorneys who might have considered entering this Case or any of the three preceding cases in support of the trustee's attempts to enforce the terms of a common law express trust against one or more attorneys involved with a serious breach of that trust.

Although trustee appears to have valid and important claims, the state courts of New Mexico, in the above sequence of nine separate actions have arbitrarily prevented these claims from being heard unequally protecting the defendants and all other licensed attorneys over the trustee and all other nonattorney fiduciaries.

The Trustee's Duty to Persist

The record above does not show willingness by attorneys to stand up for the equity interests of the trust beneficiaries damaged and obstructed by other attorneys. Litigating against friends, peers and powerful members of one's own bar as expressed by Mr. Beckley can be "distasteful." (Pet. App. 83a) Even substantial financial compensation could be counter-productive professionally. The record shows that loyalty to one's profession and peers competes strongly with loyalty to the interests of beneficiaries of a client trustee. (Pet. App. 127a, §J) The will to persist in litigation is compromised by divided loyalty.

Yet loyalty to the instructions in the trust instrument and to the equity interests of beneficiaries of the trust is *exactly* what the trust relationship requires. The settlors didn't issue the instructions in the trust instrument with

an exception for enforcing its terms against attorneys. The trustee since 2002 has persistently pursued the interests of the beneficiaries. Petitioner-Trustee quotes *Loring A Trustee's Handbook* in noting in an appellate memorandum that expecting attorney loyalty to the trust in a Case against bar associates was unreasonable. The trustee could maintain such loyalty - the attorneys could not. (Pet. App. 124a, §E; 127a, §J);

Given the evident breach of trust aided and abetted by attorneys, the requisite loyalty and persistence of other attorneys would be difficult, if not impossible, to arrange.

Appellate Opinion Raises Questions

The appellate *Opinion* in this Case raises the Questions posed by the Petitioner for review.

The New Mexico Court of Appeals had been advised of the trustee's contact with scores of New Mexico lawyers and law firms seeking representation and of the extensive time and expense needed to obtain the lawyers who filed this Case and who shortly thereafter were allowed to withdraw (Pet. App. 128a, §K) The summary closing statement in the *Opinion* responds:

> [Mr. Van Auken] argues that licensed attorneys as a class in New Mexico refuse to represent him and the Trust against other attorneys who he alleges permitted Trust property to be improperly removed from the Trust. He argues that that refusal acts as a defense against his complaints, preventing him from exercising his duty of loyalty to the Trust. However, simply because Van Auken has been unable to find counsel to represent him does not allow him to engage in the unauthorized practice of law. Pet. App. 5a, ¶6.

In reverse order, the two parts of this summary closing statement create the two Questions presented for review by this *Petition*.

The holding that the trustee has been engaged in the unauthorized practice of law conflicts with United States law in 28 U.S.C. § 1654 and New Mexico law in NMSA § 46A-3-303. This creates Question No. 1.

By denying the *pro se* trustee access to New Mexico courts, this conflicted ruling on fiduciary representation also raises the Constitutional issues in Question No. 2 and it does so both on its own and as the most recent action in a seven-year, four-case sequence of eighteen separate state court rulings which infringe trustee's rights.

REASONS FOR GRANTING THE PETITION

The reasons for granting this Petition are to review and correct the **conflicted** case law in the appellate court opinion in this Case and to review and correct actions **infringing** on the trustee's Constitutional rights caused by a seven year sequence of state court actions. Either reason should result in the restoration of the nonattorney trustee's judicial standing to appear personally in his own cases without counsel *(pro se)* in New Mexico courts.

I. THE COURT OF APPEALS OPINION CREATES CONFLICTED LAW

The appellate opinion in this Case new case law which is conflicted within existing statutes and equity practice.

The New Mexico Court of Appeals *Opinion* in *Lee v. Catron* correctly recognizes the trustee is the legal entity rather than the "trust" (Pet. App. 2a, ¶¶2,3) and reverses its earlier holding in *Van Auken v. Catron* that the trust is an "artificial legal entity" separate from the trustee. Pet. App. 13a, ¶1, lines 12-17 and ¶2, lines 6-9. Any requirement for counsel which attaches to artificial legal

entities, therefore, does not apply to a common law express trust.

The *Opinion* then creates a requirement for licensed counsel that attaches directly to the fiduciary relationship created between the trustee and the trust beneficiaries by the trust instrument. Pet. App. 3a, ¶¶4,5. An attorney is required because the trustee is representing "others," i.e., the beneficiaries. According to the *Opinion*, an attorney is a necessary part of the relationship created by the trust instrument because only an attorney is legally authorized to "represent others." Pet. App. 3a, ¶¶ 4, 5.

This holding is incorrect, conflicts with statute law, and is contrary to a long history of trust activity extending over more than a thousand years.

The fundamental error in the *Opinion* arises from re-making the historical three-part trust relationship of "settlor-trustee-beneficiary" into a conflicted four-part relationship of "settlor-trustee-attorney-beneficiary." This new structure results from the incorrect appellate holding that only a licensed attorney can properly represent the beneficiaries of a trust. While it is true that the beneficiaries as well as the trustee might benefit from being represented by licensed counsel, requiring such representation can be contrary to their respective interests as the record in this Case demonstrates.

The structure of legal and fiduciary relationships created by a common law express trust such as the trust in this Case is a prerequisite to proper review of the conflicted case law created in the appellate *Opinion*, the first reason why this Petition should be granted.

Historical Structure of a Common Law Trust

Historically, a common law or express trust relationship is established between three separate persons (or groups): (a) the settlor who creates the *trust*

instructions around *property contributed to the trust estate*, (b) the **trustee** who takes possession of the property in the trust estate and is bound to execute the instructions expressed by the settlor, and (c) the **beneficiary** for whose benefit the trust relationship is created and to whom flow the advantages of the property in the trust estate.

Historical Three-Party Trust Relationship

• Settlor-Trustee-Beneficiary •

SETTLOR

TRUST INSTRUCTIONS

TRUSTEE

Property in Trust Estate -> **BENEFICIARY**

The relationship includes four separate legal contracts (lines) and a single fiduciary duty and equitable interest in benefits (the arrow). The important fiduciary duty (of the trustee) and the related equity interest (of the beneficiary) is created through the trust instructions and is not a direct part of the trust relationship.

Legal contract #1: The settlor enters into a contractual relationship with an initial trustee and any number of successor trustees by specifying (expressing) trust terms which include (i) name(s) of the beneficiary(ies), (ii) specification of property in the trust estate, and (iii) powers and duties of trustee(s). This legal contract is generally intended to survive beyond the lifetime of the settlor.

Legal contract #2: An initial trustee or any successor trustee separately enters into a contractual relationship with the settlor by accepting responsibility for faithfully executing expressed trust instructions and by acquiring the duty to direct all benefits from property in the trust estate to named beneficiaries as instructed. This contract

generally survives beyond the lifetime of the settlor so the trustee and settlor may be strangers communicating solely through the expressed trust instructions to which each is separately bound.

Legal contract #3: Legal title to property in the trust estate is personally accepted and personally held by the trustee under terms expressed by the settlor in trust instructions.

Legal contract #4: A beneficiary named by the settlor in expressed trust instructions is legally granted particular rights to benefits of property in the trust estate and, possibly, separately specified legal rights to eventual ownership of this property held in trust by (or entrusted to) the trustee. The terms and conditions of these legal grants may not be known to the beneficiary.

Fiduciary duty / Equitable interests: All equitable interests to property in the trust estate including its on-gong benefits belong to the beneficiary as they are delivered or passed to the beneficiary by the trustee discharging fiduciary duty to the beneficiary in accordance with expressed instructions of the settlor. The equitable interests and fiduciary duty are separate and distinct from legal title to property in the trust estate which, while the trust relationship is in effect, is held by the trustee.

The definition of a common law express trust found in the American Restatement of Trusts is as follows:

> . . .[A] fiduciary relationship with respect to property arising from a [settlor's expressed] manifestation of intention to create that relationship and subjecting the person [trustee] who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons [beneficiary], at least one of whom is not the sole trustee. (*Loring A Trustee's*

Handbook, p.14 (2006 Ed) [bracketed references added]

Petitioner-Trustee traced the centuries-long history of this three part settlor-trustee-beneficiary structure of trust relationships in an appellate memorandum in this Case (Pet. App. 124a - 127a, §§ C,D,E,F,G,H).

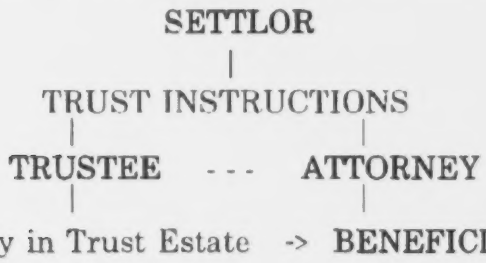
Trust Structure in Appellate Opinion

Although the appellate court heard trustee's argument that the trust is a relationship as opposed to an "entity," it missed the argument that a trust is of three parts, settlor-trustee-beneficiary, as opposed to four, settlor-trustee-attorney-beneficiary. The appellate court does not explain how the attorney is supposed to fit in.

In stating that a trustee cannot represent "others" such as the beneficiary without licensed counsel, the appellate opinion opens Pandora's box and releases a tangle of conflicting and inconsistent relationships, duties and authorities. These conflicts and inconsistencies all start with the question of exactly who it is that licensed counsel is supposed to represent.

Four-Party Trust Relationship Created by Opinion

• Settlor-Trustee-Attorney-Beneficiary •



Placing the attorney into the structure of trust relationships as a required fourth party quickly raises many fundamental issues and demonstrates ***conflicted case law***, one of two important reasons for granting this *Petition* as further detailed in separate sections below.

A. Opinion Conflicts with Statute Law

The appellate *Opinion* conflicts with existing federal statute law and existing New Mexico statute law.

28 U.S.C. §1654, Appearance personally or by counsel, states that "parties may plead and conduct their own cases personally." As legal title to the property in the trust estate is personally held by the individual trustee, under 28 U.S.C. §1654, the trustee may personally plead and conduct his own cases which involve this property. Damages and penalties claimed by trustee in this Case are examples of property in the trust estate personally owned by trustee. The "rules" of New Mexico courts do not preclude individual property owners from pleading and conducting their own cases personally.

The New Mexico Trust Code, NMSA §46A-3-303, Representation by fiduciaries and parents, subsection (D) representation by trustee, states that "a trustee may represent and bind the beneficiaries of the trust." The *Opinion* states that when a "fiduciary" such as the nonattorney individual trustee in this Case represents "others" such as trust beneficiaries, the fiduciary is engaging in "the unauthorized practice of law." Regardless of whether the trustee is in court or out of court, representing and binding beneficiaries of the trust is either permitted by law or it isn't. It is flawed understanding of the trust relationship which is responsible for this conflict.

The *Opinion* confuses a "fiduciary-other" relationship (such as the trustee-beneficiary relationship diagrammed above) with an "attorney-client" relationship. It is the creation of an attorney-client relationship by a nonattorney which leads to "unauthorized practice of law" when the "attorney" is not properly licensed by the court. However, simple legal analysis shows that representation by a fiduciary is quite different from representation by an

attorney. Attorney-client privileges don't automatically apply to fiduciaries. No fee for service from those represented by the fiduciary is proper since the representation is provided under an independent duty. Fiduciaries are not commonly seen to be "practicing law" when discharging their duties to those they "represent."

B. Opinion is Inconsistent with Equity Practice

The appellate opinion is inconsistent with equity practice in New Mexico[3] and cites Texas law (*Steele v. McDonald*) which does not represent equity practice in that state (Pet. App. 127a, §I).

II. OPINION VIOLATES CONSTITUTIONAL RIGHTS OF TRUSTEE

The appellate opinion in this Case demonstrates a seven year sequence of district court rulings and appellate opinions **infringing** trustee's Constitutional rights to equal protection and due process warranting review and correction by this Court.

Since the creation of the trust in 1979, the trustee has been the person who has held title to real property placed in the trust estate. The Constitutional rights claimed herein as being infringed by actions of New Mexico courts attach to this real property as personal property of the trustee.

Ever since title to trust property was discovered by the trustee in 2002 to be in possession of the hospice nurse, justice in New Mexico courts has been unequally dispensed in a sequence of judicial actions protecting one class of litigants, attorneys responsible for trust

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[3] See instructions for New Mexico Probate Court Forms "for use in probate court by people who are representing themselves" @ web address www.conwaygreene.com/nmsu/lpext.dll?f=templates&fn=mainh.htm&2.0

violations, over another class of litigants, individual nonattorney trustees of a common law trust attempting to recover property taken from the trust estate.

Trustee as a Personal Owner of Real Property

Legal title to real property in a trust estate is personally held by the trustee. Other than the separate duty of an individual person serving as trustee to act on behalf of equitable interests of trust beneficiaries, this legal title to real property is identical in every respect to legal title to real property personally held by that same individual person for his or her own equitable interests. Even though the duty with regard to equity is completely different, the rights and responsibilities of real property ownership are identical. Accordingly, Constitutional rights and privileges which attach to an individual (person) with regard to holding legal title to real property are identical to Constitutional rights and privileges which attach to an individual trustee holding legal title to real property. This ownership is why *Chisholm* does not apply (Pet. Ap. 130a).

Non-Attorney Fiduciaries and Attorneys as Classes

An individual person contracts to serve as the trustee of a common law express trust open to his or service by agreeing (i) to take title to property in the trust estate and (ii) to take on and loyally discharge specified duties furthering equitable interests of beneficiaries in that property exactly as specified in the trust instrument set forth by the trust settlor(s). As a class, individual trustees are property owners and fiduciaries with specific duties of loyalty to the trust instructions and to the equitable interests of the beneficiaries named therein.

An individual person becomes a licensed attorney by passing a state bar examination, requesting and maintaining a state license to practice law, and by agreeing to obey professional rules of practice. As a class,

individual lawyers are court-licensed professionals, members of the state bar association, and fiduciaries with specific duties to their clients.

With helpful assistance from the state courts, licensed attorneys in this Case have fashioned a "novel class action defense" built around (a) generally dissuading their peers from representing the trustee, (b) obtaining court orders permitting attorney withdrawal from trustee representation and (c) getting rulings which use unsettled law to dismiss trustee claims for lack of counsel (Pet. App. 122a, §B, trustee rights blocked by "class" defense).

When a court licensed-attorney aids and abets a breach of trust, a (subsequent) trustee of that trust can properly seek redress from the attorney for the attorney's acts in enabling the breach. However, if when seeking redress from an attorney, a trustee's access to the court is arbitrarily blocked and judicial construction of a trust instrument is avoided over an extended period of time, the question of unequal protection can be reasonably raised.

Furthermore, if these judicial obstacles prevent recovery of property improperly taken from the trust, a lack of due process can reasonably be asserted.

A. Opinion Grants Unequal Protection Under the Law to Attorneys

Under *Lee v. Catron*, 2009-NMCA-018, in violation of Amendment XIV, Section 1, (i) the New Mexico Court of Appeals has provided unequal protection under New Mexico trust and probate laws favoring court-licensed attorneys over a nonattorney trustee of a common law express trust and (ii) state courts of New Mexico will henceforth be able to provide unequal justice under this same case law favoring attorneys over nonattorney fiduciaries.

This Petition should be granted to review the action of the New Mexico Court of Appeals and to correct the un-Constitutional effects of *Lee v. Catron*, 2009-NMCA-018.

B. Opinion Ratifies Unequal Protection by the District Court

District court rulings in three areas has provided unequal protection to the trustee: (a) failing to construe the trust agreement, required by trustee to prove breach of trust[4], (b) permitting sudden and unexplained withdrawal of trustee's retained counsel in three of four cases[5], and (c) repeated dismissal of trustee's claims on the basis of unsettled New Mexico case law which has now been overturned[6].

In violation of Amendment XIV, Section 1, the New Mexico Court of Appeals has sustained a sequence of district court actions which, over seven years, have provided unequal protection under law by favoring members of a professional class of court-licensed attorneys over a member of a larger propertied class, nonattorney trustees of common law express trusts.

This *Petition* should be granted to review the actions of the New Mexico courts and to correct these evident equal protection violations.

C. Opinion Denies Individual Trustee the Right to Due Process

The *Opinion* of the Court of Appeals sustains dismissal of trustee's claims holding to account attorneys responsible (a) for arranging the removal of property from a trust estate breaching the trust instructions and

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[4] See Pet. Apps. 30a, 31a, 33a, 34a, 35a as examples. Others in record.

[5] See Pet. Apps. 9a, 27a, 35a

[6] See Pet. Apps. 7a, 29a

(b) for obstructing trustee's efforts since 2002 to recover the property. By sustaining the dismissal of trustee's claims, the appellate court continues a sequence of state judicial action which has allowed the taking of property from the trustee without due process.

In 1992 the trustee of the trust in this Case held title to two key pieces of family property, a two-and-one-half acre plot of unimproved land inherited from Ernest Thompson Seton and the family home on approximately seven acres of land nearby in the Timberwick section of Santa Fe, New Mexico. By 2002 the trustee no longer held title to either property and subsequent litigation has revealed that each title was transferred in breach of the written terms of valid common law express trust.

While the trustee could expect that if routine litigation could determine the improper transfers, then routine litigation would also properly restore the property titles to the trustee. However, this has not happened and the reason for this is that the judicial process administered by the State of New Mexico has impeded such determination and restoration.

As described above, a seven-year-long sequence of district court actions backed up by appellate opinion has blocked final construction of the trust instrument as repeatedly requested by the trustee and, on an *ad hoc* basis, has prevented trustee from even appearing in court.

In violation of Amendment V to the United States Constitution as enlarged by Amendment XIV, Section 1, the courts of New Mexico have effectively deprived the trustee of property belonging to the trust estate by denying the trustee due process in failing to construe the trust instrument and in blocking court access.

This *Petition* should be granted to review the actions of the New Mexico courts and to correct these due process violations.

RELEVANCE TO INDIVIDUAL OWNERSHIP OF REAL PROPERTY

The facts in this Case demonstrate a multi-year fraud against a property-owning family which lost its property to a hospice nurse through covert legal manipulation of an inter-generational trust by licensed attorneys.

Excerpts from state court pleadings appended to this *Petition* show evidence of increasing use of individual trusts to hold family homes for legal and financial reasons (Pet. App. 81a, ¶6), conflicted loyalties of licensed attorneys (Pet. App. 128a, §K), lack of outside regulation of the bar, difficulties faced in holding attorneys to account (Pet. App. 122a, §§ A, B), Uniform State Law action to formally organize trust entities for business use (Pet. App. 116a), and general erosion of trust in public institutions (Pet. App. 132a, §c).

This last issue of public trust is significant. The breakdown here results from the presence of "hands that are too confident" being placed in charge of key public processes such as property transfers, enforcement of inter-generational trusts and overall legal administration of "this unique probate world" (Pet. App. 70a, C). Unless such "hands" are properly accountable to others, public trust is eroded.

Petitioner-Trustee is still relying on the judicial process to hold attorneys to account under the law for their actions in this Case. Nonattorney trustees of family trusts should be able to depend on licensed professional attorneys for the ethical handling of family property in inter-generational trusts and estates. Such ethical behavior is best guaranteed by nonattorney trustees and fiduciaries being able to directly hold attorneys accountable for their failure to provide it as required. Of course beneficiaries should have the same power to correct bad behavior in trustees and fiduciaries.

CONCLUSION

For the two purposes of correcting conflicted case law in *Lee v. Catron*, 2009-NMCA-018 and restoring the judicial standing of the nonattorney individual trustee in this Case, this *Petition for a Writ of Certiorari* should be granted.

Respectfully submitted

Richard A. Van Auken
Trustee, *pro se*

223 North Guadalupe Street, #524
Santa Fe, New Mexico 87501
917/216-0523

Certiorari Denied, No. 31,410, December 30, 2008
FROM THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

Opinion Number: 2009-NMCA-018
Filing Date: September 16, 2008
NO. 28,590

BURR E. LEE, JR. and RUTH C. LEE SELF-DECLARATION OF TRUST, by and through itself and/or by and through RICHARD A. VAN AUKEN, trustee,
Plaintiffs-Appellants,

v.

CATRON, CATRON & POTTOW, P.A., FLETCHER R. CATRON, and KAREN AUBREY,
Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
James A. Hall, District Judge

Richard A. Van Auken
Santa Fe, NM
Pro Se Appellant

Law Office of Jack Brant, P.C.
Jack Brant
Albuquerque, NM
for Appellees Catron, Catron & Pottow, P.A.,
and Fletcher R. Catron

Dixon, Scholl & Bailey, P.A.
Gerald G. Dixon
Jennifer M. Rozzoni
Albuquerque, NM
for Appellee Karen Aubrey

OPINION

SUTIN, Chief Judge.

{1} Richard Van Auken, Trustee of the Burr E. Lee, Jr. and Ruth C. Lee Self- Declaration of Trust (the Trust), appeals pro se from an order of the district court dismissing without prejudice the complaint filed by the Trust. Defendants moved to dismiss this appeal on the basis that Van Auken could not represent the Trust on appeal. In our calendar notice, we proposed to dismiss the appeal. Both parties have responded. We have considered the arguments made by the parties and dismiss the appeal.

{2} In our calendar notice, we pointed out that we had previously required that the Trust be represented by counsel. In so doing, we relied on *Martinez v. Roscoe*, 2001- NMCA-083, ¶¶ 7, 15, 131 N.M. 137, 33 P.3d 887, where we required a limited liability company to be represented by counsel. The basis of the holding in *Martinez* was that an artificial entity could not be represented in court by a person who is not a licensed attorney. *Id.* ¶¶ 5, 7.

{3} Van Auken argues that there is no basis on which to conclude that a trust is a legal entity that must be represented by counsel. He quotes treatise language stating that a trust is not an entity. *Loring: A Trustee's Handbook* 13 (2006 ed.). He also quotes out-of-state authorities supporting the notion that a trust is not a legal entity, but rather a fiduciary relationship that acts solely through the trustee. It is true that a trust is not a legal entity and that the trustee is the proper person to sue or be sued on behalf of the trust. *See* NMSA 1978, § 46A-8-816(X) (2003) (describing trustee's power to prosecute or defend action to protect trust property). However, simply because a trust is not a legal entity that

can sue or be sued apart from its trustee does not mean that the trustee can represent the trust pro se.

{4} Whether or not a trust is a legal entity does not answer the question. The answer turns upon the trustee himself. It is clear that the trustee is to administer the trust "solely in the interests of the beneficiaries." NMSA 1978, §46A-8-802(A) (2003) (amended 2007). Thus, a trustee is acting on behalf of others who are beneficiaries of the Trust property. Van Auken argues that the beneficiaries have no title to, power over, or duty to the Trust property. That is true. However, Van Auken, as trustee, manages the Trust properties for the benefit of the beneficiaries. When he acts for the Trust, he acts for others than himself.

{5} Our case law is clear that "[t]he practice of law is usually interpreted to entail the representation of others." *United States v. Martinez*, 101 N.M. 423, 423, 684 P.2d 509, 509 (1984). The representation of parties before judicial or administrative bodies constitutes the practice of law. *State ex rel. Norvell v. Credit Bureau of Albuquerque, Inc.*, 85 N.M. 521, 526, 514 P.2d 40, 45 (1973). One who is not a licensed attorney cannot represent others in court. *See Chisholm v. Rueckhaus*, 1997-NMCA-112, ¶ 6, 124 N.M. 255, 948 P.2d 707. Because there are beneficiaries of the Trust other than Van Auken himself, his representation of the Trust results in him representing the interests of others, which is the unauthorized practice of law. *See C.E. Pope Equity Trust v. United States*, 818 F.2d 696, 697-98 (9th Cir. 1987); *Zeigler v. Nickel*, 75 Cal. Rptr. 2d 312, 314-15 (Dist. Ct. App. 1998). Where one is acting as a fiduciary for the benefit of others, he may not present arguments to a court pro se. *See Steele v. McDonald*, 202 S.W.3d 926, 928 (Tex App. - Waco 2006). It is only where a trustee is the sole beneficiary that the trustee may represent a trust

or an estate pro se. *See Tradewinds Hotel, Inc. v. Cochran*, 799 P.2d 60, 66 (Haw. Ct. App. 1990).

{6} Van Auken argues that in this case an attorney would be unable to properly represent the Trust. He apparently bases this argument on his past experiences with attempts to retain counsel. He argues that licensed attorneys as a class in New Mexico refuse to represent him and the Trust against other attorneys who he alleges permitted Trust property to be improperly removed from the Trust. He argues that that refusal acts as a defense against his complaints, preventing him from exercising his duty of loyalty to the Trust. However, simply because Van Auken has been unable to find counsel to represent him does not allow him to engage in the unauthorized practice of law.

{7} For the reasons stated herein and in the notice of proposed disposition, the appeal is dismissed.

{8} IT IS SO ORDERED.

JONATHAN B. SUTIN, Chief Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

CELIA FOY CASTILLO, Judge

FILED: JUL 23, 2008 ALBUQUERQUE

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

BURR E. LEE, JR. and RUTH C.
LEE SELF-DECLARATION OF
TRUST, by and through itself and/or
By and Through RICHARD A. VAN AUKEN, Trustee,
Plaintiffs-Appellants,

vs.

No. 28,590
Santa Fe County
CV-2007-1162

CATRON, CATRON & POTTOW, P.A.,
FLETCHER R. CATRON, and
KAREN AUBREY,
Defendants-Appellees.

NOTICE
PROPOSED SUMMARY DISPOSITION

You are hereby notified that the
Record Proper
was filed in the above-entitled cause on July 1, 2008;
Defendants' Motion to Dismiss Appeal
were filed in the above entitled cause on June 26, 2008
and June 27, 2008 and
Plaintiff's Response to Motion to Dismiss Appeal
was filed in the above-entitled cause on July 7, 2008.

This case has been assigned to the **SUMMARY CALENDAR** pursuant to Rule 12-210(D) NMRA.

Summary dismissal of the appeal is proposed.

Note: This is a *proposal* of how the Court viewsd the case. It is not a final decision. You now have twenty (20) days to file a memorandum telling the Court any reasons why this proposed disposition would or should not be made.

See Rule 12-210(D) NMRA.

Richard A. Van Auken, pro se, seeks to appeal from an order dismissing the complaint filed by the Trust. Van Auken as trustee of the Trust seeks to represent the Trust himself. We have previously pointed out to Van Auken that the Trust must be represented by counsel. *Van v. Catron*, No. 27,554 (memo. Slip op. Filed 6/27/08). We based that decision on *Martinez v. Roscoe*, 2001-NMCA-083, ¶7, 131 N.M. 137, 33 P.3d 887, where we required a limited liability company to be represented by counsel. Van Auken attempts to distinguish Martinez by arguing that a common law trust such as here is not a separate legal entity that would require representation by counsel. While such a trust may not be a separate legal entity, it is nevertheless something that needs to be represented by counsel. See *Chisholmn v. Rueckhaus*, 1997-NMCA-112, ¶6, 124 N.M. 255, 948 P.2d 707 (holding that a parent bringing an action on behalf of a child must be represented by counsel). In that case, we state that "[t]he authority to represent another as a party [to a lawsuit] does not equal the authority to practice law on their behalf." *Id.* ¶5.

Van Auken argues that nothing prohibits him from representing his interests as a fiduciary. We agree that Van Auken can represent himself and his interests, but he cannot represent the interests of the Trust. *See id.* Other jurisdictions also require a personal representative of an estate to engage counsel because the personal representative was litigating rights in a representative capacity rather than on his own behalf. See *Steele v. McDonald*, 202 S.W.3d 926, 928 (Tex. App. -Waco 2006) (citing cases from sister states disallowing pro se representation of an estate by a personal representative).

We propose to conclude that Van Auken is not authorized to represent the Trust in its appeal before this Court. Accordingly, we propose to dismiss the appeal.

[S I G N E D] JONATHAN B. SUTIN, Chief Judge

ENDORSED: FIRST JUDICIAL DISTRICT COURT
MAR 18 2008

FIRST JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF SANTA FE

Case No. D-0101-CV-2007-001162

BURR E. LEE, JR., and RUTH C. LEE SELF-DECLARATION OF TRUST, by and through itself and/or by and through RICHARD VAN AUKEN, Trustee,
Plaintiffs

vs.

CATRON, CATRON & POTTOW, P.A., FLETCHER R. CATRON, and KAREN AUBREY,

ORDER OF DISMISSAL WITHOUT PREJUDICE

This matter having come before the Court upon Defendant Catron's Motion to Dismiss and Plaintiff's Motion to Establish Legal Representation for the Trustee and Defendant Karen Aubrey's Motion to Dismiss (Argument IV); the Court having read the motions and the briefing with respect thereto; the motions having come on for hearing on February 21, 2008, at which plaintiff pro se and counsel for the defendants appeared; the Court having heard the arguments of the parties at the hearing; and being otherwise advised in the premises;

IT IS HEREBY ORDERED that Defendant Catron's Motion to Dismiss is granted, Plaintiff's Motion to Establish Legal Representation for the Trustee is denied, and this lawsuit and all claims asserted therein as against all Defendants are hereby dismissed without prejudice.

JAMES A. HALL
James A. Hall, District Judge

Approved as to form:

VIA Email 3/12/08
Richard A. Van Auken, Plaintiff, pro se

Telephonic Approval on 3-7-08
Gerald G. Dixon, Esq.
Jennifer Rozzoni, Esq.
Counsel for Defendant Karen Aubrey

[S I G N E D]
Jack Brant
Counsel for Defendants Catron, Catron & Pottow, P.A.
And Fletcher R. Catron

FILED: FIRST JUDICIAL DISTRICT COURT
2007 OCT-4 AM 8:34

FIRST JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF SANTA FE

Case No. D-0101-CV-2007-001162

BURR E. LEE, JR., and
RUTH C. LEE SELF-DECLARATION
OF TRUST, by and through itself and/or
By and through RICHARD VAN AUKEN,
Trustee,
Plaintiffs

v.

CATRON, CATRON & POTTOW, P.A.
FLETCHER R. CATRON, and
KAREN AUBREY.
Defendants.

ORDER ALLOWING WITHDRAWAL OF COUNSEL

THIS MATTER having come before the court on Plaintiff's Counsels' Motion to Withdraw and the Court finding that the Motion to Withdraw should be granted.

IT IS HEREBY ORDERED that Plaintiff shall have twenty (20) days within which to secure counsel. If Plaintiff has not secured counsel within twenty (20) days of the date the order of withdrawal is entered, Mr. Van Auken shall be deemed to have entered an appearance *pro se*.

IT IS FURTHER ORDERED that Daymon B. Ely and William Gilstrap, be allowed to withdraw as counsel for the Plaintiff in this cause.

[S I G N E D]
HONORABLE JAMES HALL

[S I G N E D]
Daymon B. Ely, Esq.
1228 Central SW, Albuquerque, NM 87102
(505) 248-0370
&
William G. Gilstrap, Esq.
P.O. Drawer H, Albuquerque, NM 87103 (505) 842-8600
Withdrawing Attorneys for Plaintiff

Richard A. Van Auken 233 *[sic]* North Guadalupe St;
#524
Santa Fe, MM *[sic]* 87501
Plaintiff Pro Se

Jack Brant, Esq.
P.O. Box 1888, Albuquerque, NM 87103

Filed: Jun 27, 2008 Albuquerque

IN THE COURT OF APPEALS OF THE
STATE OF NEW MEXICO

RICHARD A. VAN AUKEN
Plaintiff-Appellant,

v.

NO. 27,554
Consolidated with
27,555; 27,556;
27,557; 27,558

FLETCHER R. CATRON,
KAREN AUBREY,
PETER F. WIRTH, and the
ESTATE OF WILLIAM A.
SAWTELLE, [sic] JR.,
Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF
SANTA FE COUNTY
James A. Hall, District Judge

Richard A. Van Auken
Santa Fe, NM
Pro Se Appellant

Sawtell, Wirth & Biedscheid, P.C.
W. Anthony Sawtell
Santa Fe, NM

Rodey, Dickason, Sloan, Akin & Robb, P.A.
John M. Brant
Albuquerque, NM

Catron, Catron & Sawtell, P.A.
Michael T. Pottow
Santa Fe, NM

Gerald G. Dixon
Albuquerque, NM

For Appellees

MEMORANDUM OPINION

ALARID, Judge

In No. 27554, Plaintiff appeals from the order denying Plaintiff's motion for partial summary judgment entered on February 8, 2007. [RP 443] In No. 27555, Plaintiff appeals from the order dismissing claims of trustee entered on February 8, 2007 [RP 4412], which took effect on March 5, 2007, and then again on October 4, 2007, pursuant to orders of the district court entered as a result of this Court's Order on Limited Remand entered on July 31, 2007. In No. 27556, Plaintiff appeals from the district court's order dismissing claims against Peter F. Wirth with prejudice entered on February 8, 2007. [RP 438] In No. 27,577 Plaintiff appeals from the district court order granting summary judgment dismissing claims against the Estate of William A. Sawtell, Jr. entered on February 8, 2007. [RP 436] In No. 27558, Plaintiff appeals from the order granting a motion to dismiss with prejudice Plaintiff's claims against Defendant Karen Aubrey entered on February 8, 2007. [RP 445]

This Court entered an Order consolidating the appeals under Ct. App. No. 27,554. In addition, this Court has filed two calendar notices proposing to dismiss the appeals. The parties have responded with memoranda in opposition. Unpersuaded, we dismiss the appeals and remand to the district court for further proceedings consistent with this opinion.

DISCUSSION

The record proper indicates that Plaintiff Richard A. Van Auken, pro se, is the successor trustee and the sole remaining beneficiary of the Burr E. Lee, Jr. And Ruth C. Lee Self-Declaration of Trust No. 10331J (the Trust). [RP 38] All of the consolidated appeals arise out of Plaintiff's allegations that Defendants-Attorneys are responsible for

probate fraud, attorney deceit, and collusion on the Trust and Plaintiff himself as remaining sole beneficiary, for allowing and facilitating Burr E. Lee, Jr. during his lifetime as survivor of Ruth C. Lee, to transfer a house, which had been a Trust asset, out the Trust to an individual, Marie Harrison, in consideration for her care of him for the rest of his lifetime. [Id.] The district court dismissed Plaintiff's claims against Defendants Peter Wirth, Karen Aubrey, and the Estate of William Sawtell with prejudice. [RP 438, 436, 445] These orders of dismissal were apparently made on the merits of Defendants' motions to dismiss. [Id.] The orders were entered, however, at a time when Plaintiff, a pro se individual, had all along been improperly asserting the rights of himself and the Trust, an artificial entity, pro se in the complaint as amended and in all pleadings and responses to Defendants' motions. It is, therefore, unclear what final effect these orders of dismissal have with regard to all of the claims asserted against the Defendants in the complaint as amended by the Plaintiff as the Trust and as an individual.

After the orders of dismissal, Plaintiff briefly obtained counsel for the Trust and himself "as their interests may result." [RP 604, 698] Pursuant to the District Court's October 4, 2007 Orders, however, counsel was allowed to withdraw, and the Trust's motion to intervene, therefore, was properly denied on this basis. See *Martinez v. Roscoe*, 2001-NMCA-083, ¶¶ 5, 7, 14-15, 131 N.M. 137 P.3d 887 (dismissing an artificial entity's claims on appeal as being improperly filed pro se). Plaintiff on behalf of the Trust, which is not a party, is seeking to recover an asset for the Trust so that it can be distributed to himself as beneficiary. [RP 698] As such, the claims of Plaintiff individually cannot proceed without Plaintiff as Trustee recovering the Trust asset sought to be distributed to Plaintiff as individual beneficiary.

In the first calendar notice, we proposed to dismiss the appeals on the basis that the orders were not final. [Ct. App. File, CN1] In the second calendar notice, we proposed not to reach the issue of finality, because we proposed to dismiss all of the appeals on the basis that the Trust, whose interests are paramount to and interwoven with Plaintiff's interests as beneficiary of the Trust, is required to be and is not represented by counsel. *See Martinez v. Roscoe*, 2001-NMCA-083, ¶¶ 15, 131 N.M. 137, 33 P.3d 887 (dismissing an artificial entity's appeal as improperly filed pro se through an individual, because the individual and the entity were separate legal entities and the legal entity may not file pro se pleadings through its manager who is not a licensed attorney in New Mexico, even when the issue of finality is not resolved)(citing *Sunwest Bank v. Nelson*, 1998-NMSC-12, ¶ 9, 125 N.M. 170, 958 P.2d 740 (accepting jurisdiction to review an order of dismissal without prejudice for improper venue because the order disposed of the case to the fullest extent possible in the court in which it was filed)).

The parties' memoranda in opposition to the second calendar notice do not persuade us that it is appropriate for this Court, as the reviewing Court, to make, in the first instance, the determinations we set out in the second calendar notice and in the opinion below, for the district court to make on remand. Moreover, we are not persuaded by the out-of-state case law cited by Plaintiff in his memorandum. As we discussed in the first and second calendar notices, under New Mexico law the Trust may ot appear before this Court through Plaintiff, an individual, acting pro se. Finally, we deny Plaintiff's request for permission to submit amicus briefs/memoranda.

Accordingly, based on the analysis set forth in the second calendar notice, we dismiss the appeals. The result of the dismissal of the appeals is that the cases return to

the district court to determine, in light of the October 4, 2007, orders allowing counsel for the Trust to withdraw and denying the Trust's motion to intervene, whether, under Rule 1-019(B) NMRA, the case can continue in the district court with the parties before the court, or whether, without the Trust, the entire case should be dismissed. *See, e.g. Srader v. Verant*, 1998-NMSC-025, ¶ 19, 125 N.M. 521, 964 P.2d 82 (discussing that the district court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable).

The factors to be considered by the district court include: first, to what extent a judgment rendered in the absence of the Trust might be prejudicial to it or to those already parties; second, the extent to which, by protective provisions in the judgment, by shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the absence of the Trust will be adequate; fourth, whether Plaintiff will have an adequate remedy if the action is dismissed for non-joinder. *Id.*

In making the indispensable party determination in this case, the district court may also consider that joinder of the Trust while arguably feasible, has not been accomplished despite the order of the district court [RP 441; *see also* Rule 1-041(B) NMRA]. In addition, the district court may consider that the district court has given Plaintiff notice of the consequences of failing to obtain counsel for the Trust [RP 441], has ruled that the Trust may not intervene without counsel, and has given Plaintiff ample time to obtain counsel for the trust. [Id.] Finally, the district court may consider that Defendants should not be required to remain in the lawsuit indefinitely. *See, e.g.* Rule 1-041(B); *and see Roscoe*, 2001-

NMCA-083, ¶ 14 (dismissing the entity's pro se appeal does not violate the entity's due process rights).

For the reasons discussed above, we dismiss all of the appeals and remand the cases to the district court.

IT IS SO ORDERED

[S I G N E D]

A. JOSEPH ALARID, JUDGE

WE CONCUR:

[S I G N E D]

MICHAEL D. BUSTAMANTE, Judge

[S I G N E D]

CYNTHIA A. FRY, Judge

FILED: APR 15, 2008 ALBUQUERQUE

IN THE COURT OF APPEALS OF THE
STATE OF NEW MEXICO

RICHARD A. VAN AUKEN
Plaintiff-Appellant,

vs.

FLETCHER R. CATRON,	No. 27,554
KAREN AUBREY,	No. 27,555
PETER F. WIRTH, and the	No. 27,556
ESTATE OF WILLIAM A.	No. 27, 557
SAWTELLE, [sic] JR.,	No. 27,558
Defendants-Appellees	[Consolidated under Ct. App. No. 27,554]
	Santa Fe County
	D-01010-CV-2006-01509

SECOND NOTICE
PROPOSED SUMMARY DISPOSITION

You are hereby notified that the

The Memoranda in Opposition of Defendants Peter Wirth, Estate of William Sawtell, Jr., and Karen Aubrey

were filed in the above-entitled cause on January 28, 2008, January 28, 2008, and January 29, 2008, respectively;

Plaintiff Richard A. Van Auken's Memorandum in Opposition and Motion to Correct Memorandum were filed on January 30 and February 12, 2008, respectively; and

Plaintiff's Motion to Correct Memorandum is hereby GRANTED.

This case has been assigned to the SUMMARY CALENDAR pursuant to Rule 12-210(D) NMRA.

Summary dismissal of the appeal is proposed.

Note: This is a ***proposal*** of how the Court views the case. It is not a final decision. You now have twenty (20) days to file a memorandum telling the Court any reasons why this proposed disposition would or should not be made. **See Rule 12-210(D) NMRA.**

Issues on Appeal. As we discussed in the first calendar notice, the record indicates that Plaintiff Richard A. Van Auken, pro se, is the successor trustee and the sole remaining beneficiary of the Burr E. Lee, Jr. And Ruth C. Lee Self-Declaration of Trust No. 10331J (the Trust). [RP 38] All of the consolidated appeals arise out of Plaintiff's allegations that Defendants-Attorneys are responsible for probate fraud, attorney deceit, and collusion on the Trust and Plaintiff himself as remaining sole beneficiary, for allowing and facilitating Burr E. Lee, Jr. during his lifetime as survivor of Ruth C. Lee, to transfer a house, which had been a Trust asset, out of the Trust to an individual, Marie Harrison, in consideration for her care of him for the rest of his lifetime. [Id.] The district court dismissed Plaintiff's claims against Defendants Peter Wirth, Karen Aubrey, and the Estate of William Sawtell with prejudice. [RP438, 436, 445] These orders of dismissal were apparently made on the merits of Defendants' motions to dismiss. [Id.] The orders were entered, however, at a time when Plaintiff, a pro se individual, had all along been improperly asserting the rights of himself and the Trust, an artificial entity, pro se, in the complaint as amended and in all pleadings and responses to Defendants' motions. It is, therefore, unclear what final effect these orders of dismissal have with regard to all of the claims asserted against the Defendants in the complaint as amended by the Plaintiff as the Trust and as an individual.

After the orders of dismissal, Plaintiff briefly obtained counsel for the Trust and himself "as their interests may result." [RP 604, 698] Pursuant to the District Court's October 4, 2007 Orders, however, counsel was allowed to withdraw, and the Trust's motion to intervene, therefore, was properly denied on this basis. *See Martinez v. Roscoe*, 2001-NMCA-083, ¶¶ 5, 7, 14-15, 131 N.M. 137, 33 P.3d 887 (dismissing an artificial entity's claims on appeal as being improperly filed pro se). As such, Plaintiff on behalf of the Trust, which is not a party, is seeking to recover an asset for the Trust so that it can be distributed to himself as beneficiary. [RP 698] It appears that the claims of Plaintiff individually cannot proceed without Plaintiff as Trustee recovering the Trust asset sought to be distributed to Plaintiff as beneficiary.

In the first calendar notice, we proposed to dismiss the appeals on the basis that the orders were not final. [Ct. App. File, CN1] Defendants Peter Wirth, Estate of William Sawtell, Jr., and Karen Aubrey have filed memoranda in opposition to the proposed dismissal on the basis of finality. [MIOs, Ct. App. File] In this second calendar notice we now propose not to reach the issue of finality, because we propose to dismiss all of the appeals on the basis that the Trust, whose interests are paramount to and interwoven with Plaintiff's interests as a beneficiary of the Trust, is required to be and is not represented by counsel. *See e.g., Martinez v. Roscoe*, 2001-NMCA-083 ¶15, 131 N.M. 137, 33 P.3d 887 (dismissing an artifical entity's appeal as improperly filed pro se through an individual, because the individual and the entity were separate legal entities and the legal entity may not file pro se pleadings through its manager who is not a licensed attorney in New Mexico, even when the issue of finality is not resolved) (citing *Sunwest Bank v. Nelson*, 1998-NMSC-12, ¶9, 125 N.M. 170, 985 P.2d 740 (accepting jurisdiction to review an order of dismissal

without prejudice for improper venue because the order disposed of the case to the fullest extent possible in the court in which it was filed)).

The result of our proposed dismissal appears to be that the case returns to the district court to determine, in light of the October 4, 2007 orders allowing counsel for the Trust to withdraw and denying the Trust's motion to intervene, whether under Rule 1-019(B) NMRA the case can continue in the district court with the parties before the court, or whether, without the Trust, the entire case should be dismissed. *See e.g., Srader v. Verant*, 1998-NMSC-025, ¶19, 125 N.M. 521, 964 P.2d 82 (discussing that the district court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable). The factors to be considered by the district court include: first, to what extent a judgment rendered in the absence of the Trust might be prejudicial to it or to those already parties; second, the extent to which, by protective provisions in the judgment, by shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the absence of the Trust will be adequate; fourth, whether Plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. *Id.*

In making the indispensable party determination in this case, it appears that the district court may also consider that joinder of the Trust while arguably feasible, has not been accomplished despite the order of the district court. [RP 441; *see also* Rule 1-041(B) NMRA]. In addition, the district court may consider that the district court has given Plaintiff notice of the consequences of failing to obtain counsel for the Trust [RP 441], has ruled that the Trust may not intervene without counsel, and has given Plaintiff ample time to obtain counsel for the Trust.

[Id.] Finally, the district court may consider that Defendants should not be required to remain in the lawsuit indefinitely. *See, e.g.,* Rule 1-041(B); and *Roscoe,* 2001-NMCA-083, ¶14 (dismissing the entity's pro se appeal does not violate the entity's due process rights).

Accordingly, for the reasons discussed above, we propose to dismiss all of the appeals and remand the cases to the district court.

[S I G N E D]

A. JOSEPH ALARID, Judge

FILED: JAN 07, 2008 ALBUQUERQUE

IN THE COURT OF APPEALS OF THE
STATE OF NEW MEXICO

RICHARD A. VAN AUKEN
Plaintiff-Appellant,

vs.

FLETCHER R. CATRON,	No. 27,554
KAREN AUBREY,	No. 27,555
PETER F. WIRTH, and the	No. 27,556
ESTATE OF WILLIAM A.	No. 27, 557
SAWTELLE, [sic] JR.,	No. 27,558
Defendants-Appellees	[Consolidated under Ct. App. No. 27,554] Santa Fe County D-01010-CV-2006-01509

NOTICE
PROPOSED SUMMARY DISPOSITION

You are hereby notified that the

Record Proper

was filed in the above-entitled cause on **July 10, 2007**; and that

this Court's **Order Consolidating Appeals and of Limited Remand** was filed in the above-entitled cause on **July 31, 2007**; and that

Plaintiff's Motion to Allow Late Entry of Signed Orders and Notice of Rulings in Lieu of Signed Orders

was filed in the above entitled cause on **October 1, 2007**; and that the

Responses of Defendants Karen Aubrey, Estate of William A. Sawtell, Jr., Peter F. Wirth, and Fletcher R. Catron

were filed in the above-entitled cause on **October 19, 2007** and **October 22, 2007**; and that

Pursuant to Defendants' October 19 and 22, 2007 Responses to Plaintiff's October 1, 2007 Motion, this Court accepts the certified copies of District Court James A. Hall's (1) Order Allowing Withdrawal of Counsel Daymon B. Ely and William Gilstrap as counsels for Plaintiff, and (2) Order Denying Motion to Intervene of the Burr E. Lee, Jr. And Ruth C. Lee Self-Declaration of Trust No. 10331J, which were filed in District Court on October 4, 2007, and in this Court on October 19, 2007 as orders filed in compliance with this Court's July 31, 2007 Order of Limited Remand. These District Court Orders are hereby made part of the record for this Court's review on appeal. To the extent Plaintiff's October 1, 2007 Motion requests other or different relief, such requests are DENIED.

This case has been assigned to the SUMMARY CALENDAR pursuant to Rule 12-210(D) NMRA.

Summary dismissal of the appeal is proposed.

Note: This is a *proposal* of how the Court views the case. It is not a final decision. You now have twenty (20) days to file a memorandum telling the Court any reasons why this proposed disposition would or should not be made. See Rule 12-210(D) NMRA.

Issues on Appeal. The record indicates that Plaintiff Richard A. Van Auken, pro se, is the successor trustee and the sole remaining beneficiary of the Burr E. Lee, Jr. And Ruth C. Lee Self-Declaration of Trust No. 10331J (the Trust). [RP 38] All of the consolidated appeals arise out of Plaintiff's allegations that Defendants-Attorneys are responsible for probate fraud, attorney deceit, and collusion on the Trust and Plaintiff himself as remaining sole beneficiary, for allowing and facilitating Burr E. Lee, Jr. during his lifetime as survivor of Ruth C. Lee, to

transfer a house, which had been a Trust asset, out of the Trust to an individual, Marie Harrison, in consideration for her care of him for the rest of his lifetime. [Id.] The district court dismissed Plaintiff's claims against Defendants Peter Wirth, Karen Aubrey, and the Estate of William Sawtell with prejudice. [RP438, 436, 445] While these orders appear to be final, appealable orders, we propose to dismiss Plaintiff's appeals of them on the basis discussed below.

At the same time that the district court entered the orders dismissing Defendants Wirth, Aubrey and the Estate of William Sawtell, with prejudice, the district court entered an order denying Plaintiff's motion for partial summary judgment against Defendant Fletcher Catron on the basis that the Trust provision at issue is ambiguous. [RP 443] This order appears not to be a final, appealable order. *See, e.g. Handmaker v. Henney,* 1999-NMSC-043, ¶ 8, 128 N.M. 328, 992 P.2d 879 (stating that, "[t]here is no question that the district court's denial of [a defendant's] motion for summary judgment is an interlocutory order which fails to dispose of the merits of the action and is, therefore, not a final decision for purposes of Section 39-3-2) (citing *B.L. Goldberg & Assocs. V. Uptown, Inc.*, 103 N.M. 277, 278, 705 P.2d 683, 684 (1985) ("For purposes of appeal, an order or judgment is not considered final unless all issues of law and fact have been determined and the case disposed of by the trial court to the fullest extent possible.")).

At the same time that the district court granted Defendants Wirth, Aubrey and Estate of Sawtell's motions to dismiss with prejudice, the district also entered an order proposing to dismiss all claims of Plaintiff as Trustee by March 5, 2007, on the basis that Plaintiff was appearing pro se on behalf of the Trust, an entity. [RP 441] While that order does not dismiss the claims of Plaintiff individually as the sole remaining beneficiary

under the Trust, Plaintiff's claims as Trustee appear to be paramount to or inextricably interwoven with Plaintiff's individual claims as a beneficiary. That is, the gravamen of the Amended and Second Amended Complaints is that the Defendants-Attorneys committed fraud in allowing a Trust Asset, a house called the Timberwick Property, to be transferred out of the Trust. As such, Plaintiff on behalf of the Trust is seeking to recover the asset for the Trust so that it can be distributed to himself as beneficiary. [RP 698] The claims of Plaintiff individually cannot proceed without Plaintiff as Trustee recovering the Trust asset sought to be distributed to Plaintiff as beneficiary. [See *e.g.*, the Second Amended Complaint, which states *[sic]* does not describe Plaintiff's and the Trust interest as separate claims: stating that this action is filed for the benefit of Plaintiff himself and the Trust "as their respective interests may result." [RP 698]]; *see also Banquest/First Nat'l Bank v. LMT, Inc.*, 105 N.M. 583, 585, 734 P.2d 1266, 1268 (1987) (stating that, "[w]e are not faced here with an appeal from a final order disposing of entirely separate claims. The claims and counterclaims asserted by the parties are intertwined in many respects. As a matter of policy, we wish to avoid 'fragmentation in the adjudication of related legal or factual issues'") (quoted authority omitted)). Thus, since all the issues in this case must be resolved by the trial court before any judgment relating to the Trust becomes final, and since, as a matter of policy, this Court does not favor piecemeal appeals, we are not inclined to allow this case to be appealed on a piecemeal basis, and therefore propose to dismiss Plaintiff's appeals from all of the district court orders as non-final.

Moreover, although Plaintiff initially succeeded in having counsel appear for the Trust and himself "as their interests may result" [RP 604, 698], pursuant to the District Court's October 4, 2007 Orders, such counsels

were allowed to withdraw and the Trust's motion to intervene, therefore, was properly denied. See *Martinez v. Roscoe*, 2001-NMCA-083, ¶¶ 5, 7, 14-15, 131 N.M. 137, 33 P.3d 887 (dismissing an artificial entity's claims on appeal as being improperly filed pro se). The fact that the Trust does not have counsel pursuant to the district court's October 4, 2007 Orders, and the fact that the Trust's interests are paramount to and inextricably intertwined with Plaintiff's individual claims, appear to be principles that are fatal to the continuation of Plaintiff's case below and on appeal.

Accordingly, we propose to dismiss Plaintiff's appeals.

[S I G N E D]

A. JOSEPH ALARID, Judge

FILED: FIRST JUDICIAL DISTRICT COURT
2007 OCT-4 AM 8:34

FIRST JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF SANTA FE

Case No. D-0101-CV-200601509

RICHARD A. VAN AUKEN
Plaintiff

v.

FLETCHER R. CATRON, et al.,
Defendants

ORDER ALLOWING WITHDRAWAL OF COUNSEL

THIS MATTER having come before the court on Plaintiff's Counsels' Motion to Withdraw and the Court finding that the Motion to Withdraw should be granted.

IT IS HEREBY ORDERED that Daymon B. Ely and William Gilstrap, be allowed to withdraw as counsel for the Plaintiff in this cause.

[S I G N E D]
HONORABLE JAMES HALL

[S I G N E D]
Daymon B. Ely, Esq.
1228 Central SW, Albuquerque, NM 87102 (505) 248-0370
&
William G. Gilstrap, Esq.
P.O. Drawer H, Albuquerque, NM 87103 (505) 842-8600
Withdrawing Attorneys for Plaintiff

Richard A. Van Auken
233 *[sic]* North Guadalupe St; #524
Santa Fe, MM *[sic]* 87501
Plaintiff Pro Se

Jack Brant, P.O. Box 1888, Albuquerque, NM 87103

Mr. Michael T. Pottow, P.O. Box 788, Santa Fe, NM 87504-0788
Attorneys for Fletcher Catron

Gerald G. Dixon, Esq., Dixon, Scholl & Bailey, P.O. Box 26746, Albuquerque, NM 87125-6746

W. Anthony Sawtell, Personal Representative, Estate of William A. Sawtell, JR., 708 Paseo de Peralta, Santa Fe, NM 87501

Bryan P. Biedscheid, Esq., Sawtell, Wirth & Biedscheid, P.C., 708 Paseo de Peralta, Santa Fe, NM 87501

ENDORSED: FIRST JUDICIAL DISTRICT COURT: FEB 08 2007

FIRST JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF SANTA FE

Case No. D-0101-CV-200601509
RICHARD A. VAN AUKEN
Plaintiff

vs.

FLETCHER R. CATRON, et al.
Defendants

ORDER DISMISSING CLAIMS OF TRUSTEE

This matter having come before the Court upon Defendant Catron's Motion to Dismiss Claims of Trustee, and the Court having considered written and oral argument of counsel and pro se party, and the Court being otherwise informed in the premises;

IT IS HEREBY ORDERED that any claims asserted by the Trustee of the Burr E. Lee, Jr. and Ruth C. Trust *[sic]* must be advanced by an attorney licensed to practice law in New Mexico. Richard Van Auken is hereby given a period of time until March 5, 2007 to secure the services of counsel on behalf of the Trust. Should no attorney enter his or her appearance on behalf of the Trust within that period of time, all such claims will be dismissed without prejudice.

[S I G N E D]
James A. Hall, District Judge

Submitted by:
CATRON, CATRON & POTTOW, P.A.
Attorneys for Defendant Catron
P.O. Box 788, Santa Fe, New Mexico 87504-0788
By: Michael T. Pottow

ENDORSED: FIRST JUDICIAL DISTRICT COURT: FEB 08 2007

FIRST JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF SANTA FE

Case No. D-0101-CV-200601509

RICHARD A. VAN AUKEN
Plaintiff

vs.

FLETCHER R. CATRON, et al.
Defendants

ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This matter having come before the Court upon Plaintiff's Rule 1-056 Motion for Summary Judgment That Trust Terms Were Violated by Property Removal, and the Court having considered written and oral argument of counsel and *pro se* party, and the Court being otherwise informed in the premises;

The Court FINDS that the Burr E. Lee, Jr. and Ruth C. Lee Self-Declaration of Trust No. 10331J, executed in 1979, is ambiguous and open to more than one plausible interpretation. The foregoing Finding constitutes a genuine issue as to a material fact necessary to Plaintiff's Motion.

Therefore, it is hereby ORDERED that Plaintiff's Rule 1-056 Motion for Summary Judgment That Trust Terms Were Violated by Property Removal be and hereby is denied.

[S I G N E D]
James A. Hall, District Judge

Submitted by:
CATRON, CATRON & POTTOW, P.A.
Attorneys for Defendant Catron
P.O. Box 788, Santa Fe, New Mexico 87504-0788

FILED FIRST JUDICIAL DISTRICT COURT
04 NOV 18 PM 1:02

FIRST JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF SANTA FE

Case No. D-0101-CV-2003-01861

JUDITH ALEXANDER, GRETCHEN VAN AUKEN, SUSAN VAN AUKEN, RICK VAN AUKEN and BETSY LEE JOPPE,
Plaintiffs

v.

MARIE ANTOINETTE HARRISON,
Defendant

ORDER GRANTING RULE 1-012(B)(6) / RULE 1-056 MOTION TO DISMISS AND DISMISSING CASE WITH PREJUDICE

THIS MATTER having come before the Court on October 12, 2004, on Defendant's Rule 1-012(B)(6)/Rule 1-056 Motion to Dismiss All Counts or, in the Alternative, to Dismiss Plaintiffs' Count Two (Negligence Per Se), Plaintiffs appearing through their counsel Jonathan M. Diener, Esq., and Plaintiffs Gretchen Van Auken, Susan Van Auken and Rick Van Auken appearing in person, Defendant Marie Antoinette Harrison appearing in person and through her counsel Sawtell, Wirth & Biedscheid, P.C. (Peter F. Wirth, Esq.), and the Court, having considered the pleadings, heard argument of counsel and being otherwise fully advised in the premises, finds that there are no genuine issues as to any material fact and that the Defendant is entitled to judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that this case shall be and hereby is dismissed with prejudice, at plaintiffs' cost.

Dated November 18, 2004

[S I G N E D]
Carol J. Vigil, First Judicial District Court
Division III

Submitted by:

SAWTELL, WIRTH & BIEDSCHEID, P.C.
Attorneys for Marie Antoinette Harrison
708 Paseo de Peralta
Santa Fe, New Mexico 87501

By [S I G N E D]
Peter F. Wirth

Approved as to form:

JOHANTHAN M. DIENER, ESQ.
Attorney for Judith Alexander, Gretchen Van Auken,
Susan Van Auken, Rick Van Auken and
Betsy Lee Joppe
P O Box 14
Mule Creek, New Mexico 88051-0014
(505) 534-1660

By by telephone 11-18-04
Jonathan M. Diener

FILED: FIRST JUDICIAL DISTRICT COURT:
October 28, 2004
STATE OF NEW MEXICO
FIRST JUDICIAL DISTRICT COURT
Chambers of Carol J. Vigil, District Judge, Division Three

Jonathan Diener, Esq.
Peter Wirth, Esq.
Rick Van Auken, pro se
Re: Judith Alexander, et al. v. Marie Antoinette Harrison
D-0101-CV-200301861

Dear Counsel:

I have reviewed the pleadings in this matter and hereby give you my decision.

This matter was before the Court on September 27, 2004, upon a Motion to Dismiss filed by Defendant. The Court finds the Motion well taken.

The Defendant was appointed as Personal Representative of the Estate of Barr *[sic]* E. Lee, Jr. (D-0101-PB-200200163). On September 23, 2002, the Plaintiffs herein filed a claim against the Estate. As a basis of their claim they cited the Trust. The Personal Representative denied the claim and the Plaintiffs did not contest this decision nor did they appeal the disallowance.

The Plaintiffs rely on the fact that Fletcher Catron advised them that there was no property left. It was incumbent upon the Plaintiffs' attorney to do independent research about the facts through discovery. The Court notes the violation of LR 1-306 (C) and will impose sanctions.

The Court is not persuaded by Plaintiffs arguments. The Court firmly believes in Judicial Economy and the probate code provides for Pendant Jurisdiction of related matters. See Section 45-1-1-2(B)(4).

Therefore, the Motion to Dismiss is granted.

Counsel for the Defendant shall prepare the Order.

Sincerely [SIGNED] Carol J. Vigil, District Court Judge

ENDORSED: FIRST JUDICIAL DISTRICT COURT:
APR 12 2004

FIRST JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF SANTA FE

Case No. D-0101-CV-2003-01861

JUDITH ALEXANDER, GRETCHEN VAN AUKEN, SUSAN VAN AUKEN, RICK VAN AUKEN and BETSY LEE JOPPE
Plaintiffs

v.

MARIE ANTOINETTE HARRISON,
Defendant

STIPULATED ORDER REGARDING EXTRINSIC EVIDENCE

THIS MATTER having come before the Court on the stipulation of the parties, the Court having been advised that one of the issues in dispute is the scope of the former trustee's authority to make distributions under the terms of the Burr and Ruth Trust and the Burr Trust,

IT IS THEREFORE ORDERED that until such time as the Court conducts a *Mark V* analysis and determines whether the Trust documents are ambiguous, no parol or extrinsic evidence shall be submitted to the Court as part of any pleadings, motions or otherwise, for purposes of interpreting the meaning of any of the Trust documents.

Dated April 9, 2004

ORIGINAL SIGNED BY JUDGE CAROL J. VIGIL
Carol J. Vigil, First Judicial District Court
Division III

ENDORSED: FIRST JUDICIAL DISTRICT COURT: MAR 05 2003

FIRST JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF SANTA FE

CASE No. D-0101-CV-2002-00163

IN THE MATTER OF THE ESTATE OF BURR E. LEE JR.,
Deceased

ORDER FOR LEAVE TO WITHDRAW

THE ABOVE MATTER having come before the Court on Karen Aubrey's Motion for Leave to Withdraw, and the court being fully advised,

IT IS ORDERED that the motion is granted and until and unless other counsel enters an appearance on behalf of the Claimants Gretchen Van Auken, PO Box 152, Gila, New Mexico 88038 (505-535-4111; Susan VanAuken, Box 2, Gila, NM 88038 (telephone unknown); Judith Alexander, 1442 30th Street, Port Townsend, WA 98368 (360-385-5794); Richard Van Auken, c/o Brooklyn Sports, c/o Michael R. Schaum, 295 9th Street, Brooklyn, New York 11215 (telephone unknown); Betsy Lee Joppe, 18985 C Wilderness Court, Brooklfield, WI 53005 (262-782-2536, [sic] they shall be deemed to be representing themselves, pro se.

ORIGINAL SIGNED BY JUDGE CAROL J. VIGIL
District Court Judge

Submitted:
[S I G N E D] Karen Aubrey, Esq.
Post Office Box 8435, Santa Fe, New Mexico 87504, 982-4287

Approved:
[S I G N E D] Fletcher R. Catron
Catron, Catron & Sawtell, P.A.
Attorney for Personal Representative
PO Box 788, Santa Fe, New Mexico 87504

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO
February 13, 2009

No. 31,410

BURR E. LEE, JR., and
RUTH C. LEE SELF-DECLARATION
OF TRUST, by and through itself and or
By and through RICHARD A. VAN AUKEN,
Trustee,

Plaintiff-Petitioner

v.

CATRON, CATRON & POTTOW, P.A.,
FLETCHER R. CATRON, and KAREN
AUBREY

Defendants-Respondents

ORDER

WHEREAS, this matter came on for consideration by the Court upon motion for reconsideration, and the Court having considered said motion, and being sufficiently advised, Chief Justice Edward L. Chavez, Justice Patricio M. Serna, Justice Petra Jimenez Maes, Justice Richard C. Bosson, and Justice Charles W. Daniels concurring;

NOW, THEREFORE, IT IS ORDERED that the motion for reconsideration hereby is DENIED.

IT IS SO ORDERED.

WITNESS, the Hon. Edward L. Chavez, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 13th day of February, 2009
(S E A L) [SIGNED]
Madeline Garcia, Chief Deputy Clerk

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO
December 30, 2008

NO. 31,410

BURR E. LEE JR., and
RUTH C. CLEE SELF-DECLARATION
OF TRUST, by and through itself and or
By and through RICHARD A. VAN AUKEN,
Trustee

Plaintiff-Petitioner

vs.

CATRON, CATRON & POTTOW, P.A.,
FLETCHER R. CATRON, and KAREN
AUBREY,

Defendants-Respondents

ORDER

This matter coming on for consideration by the Court upon petition for writ of certiorari and response and the Court having considered said pleadings, and being sufficiently advised, Chief Justice Edward L. Chavez, Justice Patricio M. Serna, Justice Pewtra Jimeneaz Maes, Justice Richard C. Bosson and Justice Charles W. Daniels concurring;

NOW, THEREFORE, IT IS ORDERED that the petition for writ of certiorari and response are denied in Court of Appeals number 28,590.

IT IS SO ORDERED.

WITNESS, The Hon. Edward L. Chavez, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 30th day of December, 2008.

(SEAL) (SIGNED)
Amy Meyer, Deputy Clerk

Filed: Oct 21 2008 Albuquerque

IN THE COURT OF APPEALS OF THE
STATE OF NEW MEXICO

BURR E. LEE, JR. and RUTH C. LEE SELF-DECLARATION OF TRUST, by and through itself and/or by and through RICHARD A. VAN AUKEN, trustee,

Plaintiffs-Appellants,

v. No. 28,590

CATRON, CATRON & POTTOW, P.A., FLETCHER R. CATRON, and KAREN AUBREY,

Defendants-Appellees.

JONATHAN B. SUTIN
Presiding Judge
MICHAEL E. VIGIL
Judge
CELIA FOY CASTILLO
Judge

ORDER

In this cause, a motion for rehearing having been filed by Plaintiff-Appellant Richard A. Van Auken and consideration having been had by all of the panel members of the original panel,

IT IS ORDERED that the motion for rehearing is DENIED.

[S I G N E D]
Jonathan B. Sutin
Presiding Judge

U.S. Code, Judiciary and Judicial Procedure:

28 U.S.C. §1654, Appearance personally or by counsel

Current as of: January 3, 2007

§1654. *Appearance personally or by counsel.* In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

New Mexico Statutes Annotated (1978): Attorneys

Chapter 36, Article 2

Current as of: January 3, 2007

§36-2-17. *Attorney deceit or collusion*: If an attorney is guilty of deceit or collusion or consents thereto with intent to deceive the court, judge or party, he shall forfeit to the injured party, treble damages to be recovered in a civil action, and may, if in the opinion of the board of bar examiners such conduct warrants it, be disbarred.

New Mexico Declaratory Judgment Act:

Chapter 44, Article 6

Current as of: January 3, 2007

§44-6-2. *Scope*: In cases of actual controversy, district courts within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect and shall have the force and effect of a final judgment or decree.

§44-6-4. *Power to Construe*: Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute,

ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

§44-6-14. *Construction*: The Declaratory Judgment Act [44-6-1 to 44-6-15 NMSA 1978] is declared to be remedial. The act's purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations, and is to be liberally construed and administered.

New Mexico Probate Code: §45-1-101 NMSA 1978 et seq.
Current as of: January 3, 2007

§45-1-102(B) *Purposes of Act*: The underlying purposes and policies of the [Uniform] Probate Code are:
(2) to discover and make effective the intent of a decedent in distribution of his property;
(4) to facilitate use and enforcement of certain trusts.

§45-1-106(A) *Effect of Fraud or Evasion*: If fraud has been perpetrated in connection with any proceeding or in any statement filed under the [Uniform] Probate Code [45-1-101 NMSA 1978] or if fraud is used to avoid or circumvent the provisions or purposes of the code, any person injured thereby may obtain appropriate relief against the perpetrator of the fraud including restitution from any person (other than a bona fide purchaser) benefiting from the fraud, whether innocent or not. Any proceeding must be commenced within two years after the discovery of the fraud. No proceeding may be brought against one not a perpetrator of the fraud later than five years after the time of commission of the fraud.

New Mexico Trust Code: NMSA §46A-3-303, et seq.
Representation by fiduciaries and parents,
subsection (D) representation by trustee
Enacted: 2003

§46A-3-303. Representation by fiduciaries and parents.

To the extent there is no conflict of interest between the representative and the person represented or among

those being represented with respect to a particular question or dispute:

D. a trustee may represent and bind the beneficiaries of the trust;

E. a personal representative of a decedent's estate may represent and bind persons interested in the estate; and

F. a parent may represent and bind the parent's minor or unborn child if a conservator or guardian for the child has not been appointed.

U.S. Constitution, Amendment XIV, Section 1: Equal protection and due process
Enacted: July 9, 1868

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Constitution, Amendment V: Due process
Enacted: December 15, 1791

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process.

******** *(Trust Agreement - Page One)* ********

State of Illinois:

County of Cook: SS (Sworn Statement)

BURR E. LEE, JR. and RUTH C. LEE SELF-DECLARATION OF TRUST NO. 10331J

TRUST DECLARATION: We, BURR E. LEE, JR. and RUTH C. LEE, as settlors, herewith transfer to ourselves as trustee the sum of Ten ($10.00) Dollars and declare said sum to be held by ourselves as trustee in trust for and upon the uses set out in this Declaration of Trust. We state that in addition, it is our intention to take title to other property, both real and personal, as trustee in the name of this trust. All such property and additions thereto are herein referred to as the "trust estate" and shall be held upon the following trusts.

SECTION ONE: TRUST BENEFICIARIES:

1. During our lifetimes the income from the trust shall be paid to us in convenient installments or otherwise as we may from time to time direct and also such sums of principal as we may request.

In the event of a successor corporate trustee said requests shall be made in writing. If at any time or times a beneficiary shall be under a legal disability or by reason of illness or mental or physical disability be, in the opinion of the trustee, unable properly to manage his affairs, the trustee may use sums from the income and principal of the trust estate as the trustee deems necessary or advisable for the care, support and comfort of the beneficiary, or for any other purpose the trustee considers to be for the best interests of the beneficiary, adding to principal any income not so used.

2. a. Commencing with the death of either BURR E. LEE, JR. or RUTH C. LEE, the trustee shall pay all of the estate expenses, costs of administration, estate taxes

and inheritance taxes for the deceased, and after payment of same shall continue to hold or distribute the trust estate for the survivor of BURR E. LEE, JR. and RUTH C. LEE. The trustee shall continue to pay income and such sums of principal to the survivor as requested.

b. Commencing with the death of both BURR E. LEE, JR. and RUTH C. LEE, the trustee shall pay all of the estate expenses, costs of administration, estate taxes and inheritance taxes for the deceased, and after payment of same shall continue to hold or distribute the trust estate in the following manner:

i. If the trust estate includes a 2.5 acre parcel in Timberwick, New Mexico, and said parcel is not improved with a residence, said parcel shall be distributed to GRETCHEN VAN AUKEN. Said parcel of real estate shall be evaluated as of the date of death of the survivor of BURR E. LEE, JR. and RUTH C. LEE. If it is equal to one-seventh (1/7) or more of the trust estate, it shall be distributed outright to GRETCHEN VAN AUKEN

******* *(Trust Agreement - Page Two)* *********

as her distribution under the trust. If it is less than one seventh (1/7), she shall share in the distribution of the remainder of the trust estate so that she receives one seventh (1/7) of the trust estate

If said parcel in Timberwick, New Mexico, is improved with a single-family residence at the time of distribution, it shall not be distributed to GRETCHEN VAN AUKEN, but shall be distributed with the total trust estate and GRETCHEN VAN AUKEN shall share in said distribution to the extent of one-seventh (1/7) of the total trust estate.

ii. The remainder of the trust estate, after distribution in accordance with subparagraph 2.b.i above, shall be distributed equally among RICHARD A. VAN AUKEN, SUSAN L. VAN AUKEN, JUDITH G. VAN

AUKEN, BURR JEFFREY LEE, CAROL L. BOYKE and ELIZABETH M. LEE. Said distribution shall take into account the provisions of subparagraph 2.b.i above in regard to distribution to GRETCHEN VAN AUKEN.

iii. In the event any of the aforementioned beneficiaries are deceased at the death of both BURR E. LEE, JR. and RUTH C. LEE, but leave descendants surviving them, then the trustee shall hold or distribute the share of the deceased beneficiary for the benefit of the descendants of the deceased beneficiary, dividing the same into equal shares, per stirpes. In the event any of the afore-mentioned beneficiaries predecease BURR E. LEE, JR. and RUTH C. LEE not leaving descendants surviving them at their death, then their share shall be held or distributed among the other surviving beneficiaries or their descendants in equal shares, per stirpes.

iv. If any descendants of a predeceased beneficiary share under the terms of this trust then we direct our trustee as follows:

a) The share of each descendant shall immediately vest subject to postponement of possession.

b) As to each share of the trust estate which is distributable to a descendant who has not reached the age of twenty-one (21) the trustee may (1) establish therewith a custodianship for the descendant under a Uniform Gifts to Minors Act or (2) retain possession of the share as a separate trust until the descendant reaches majority, meanwhile paying to him or her so much or all of the income and principal of the share as the trustee deems necessary or advisable from time to time for his or her needs, best interests, education and welfare, and adding to the principal any income not so paid.

c) Distribution of a descendant's share shall be at age twenty-one (21)

SECTION TWO: SUCCESSOR TRUSTEES:

1. In the event of the death of BURR E. LEE, JR. or RUTH C. LEE, the survivor shall act as the successor trustee under this trust.

2. In the event of the death, resignation or inability of both BURR E. LEE, JR. and RUTH C. LEE to act as trustee, the second successor trustee under this trust shall be CITIZENS BANK AND TRUST

COMPANY of Park Ridge, Illinois.

A determination as to whether any trustee is unable to act shall be made by a physician and any successor trustee may rely upon written notice of that determination.

SECTION THREE: ADMINISTRATIVE PROVISIONS

The following provisions shall apply to the trust estate and to each trust under this Declaration:

1. Construction: The law of the state in which the trust property shall from time to time have its situs for administration shall govern the validity and interpretation of the provisions of this trust declaration. Initially this state shall be the State of Illinois. The administrative provisions of this trust shall be construed literally to incorporate any provisions set forth in any deed in trust conveying the real property subject to terms of this trust.

2. Indemnification of depositories and transfer agents: Any institution in which trust funds are invested or deposited or any stock transfer agent may act upon the signature of the successor trustee, or signature of the co-trustees, co-successor trustees, as applicable; to effect deposits, transfers or other actions with respect to the deposit or stock, bond, etc. as our successor shall determine. The institutions that may deal with said accounts or stocks, etc., shall not be responsible to

inquire as to the authority of the trustee or follow the application of said funds, and we herewith indemnify and hold them harmless from so acting upon directions from any successor trustee hereunder.

3. Facility of Payment: Income or discretionary amount of principal payable to a beneficiary who is incapacitated or under a legal disability may be paid by the trustee to the beneficiary, to his or her legal representative or custodian under a Uniform Gifts to Minors Act or to a relative or friend for his or her benefit, or may be expended by the trustee directly for the needs and best interests of the beneficiary.

4. Spendthrifts: The interest of beneficiaries in principal or income shall not be subject to the claims of any creditor, any spouse for alimony or support, or other, or to legal process, and may not be voluntarily or involuntary alienated or encumbered. This provision shall not limit the exercise of any power of appointment.

5. Common Funds: For convenience of administration or investment, the trustee may hold the several trusts as a common fund, dividing the income proportionately among them, assign undivided interests to the several trusts and make joint investments of the funds belonging to them. The trustee may consolidate any separate trust with any other trust with similar provisions for the same beneficiary or beneficiaries created by us or any member of our family.

6. Accrued Income: Income received after the last income payment date and undistributed at the termination of any estate or interest shall, together with any accrued income, be paid by the trustee as income to the persons entitled to the next successive interest in the proportions in which they take that interest.

7. Compensation: The corporate trustee shall render an account of his receipts and disbursements at

least annually to us if living, otherwise to each adult income beneficiary. The trustee shall be

******** *(Trust Agreement - Page Four)* ********

reimbursed for all reasonable expenses incurred in the management and protection of the trust any successor trustee shall receive fair compensation. A trustee's regular compensation shall be charged half against income and half against principal, except that the trustee shall have full discretion to charge a larger portion or all against income.

8. Perpetuity Savings: No trust created hereby , or by exercise of a power of appointment hereunder, shall continue for more than 21 years after the death of the last to die of ourselves and the beneficiaries in being at our deaths. Any property still held in trust at the expiration of that period shall immediately be distributed to the persons then entitled to receive or have the benefit of the income therefrom in the proportions in which they are entitled thereto, or if their interests are indefinite, then in equal shares.

9. Additions: We or any other person may transfer, devise or bequeath additional property to the trustee to be held under this declaration and may designate the trust to which the addition shall be made. If the addition is made by Will, the trustee may accept the statement of the legal representative that the assets delivered to the trustee constitute all of the property to which the trustee is entitled, without any duty to inquire into the representative's administration or accounting.

10. Powers: The trustee shall hold, manage, care for and protect the trust property and shall have the following powers and, except to the extent inconsistent herewith, those now or hereafter conferred by Illinois law:

(a) To retain any property (including stock of any corporate trustee hereunder or of a parent or affiliate

company) originally constituting the trust or subsequently added thereto, although not of a type, quality or diversification considered proper for trust investments.

(b) To invest and reinvest the trust property in bonds, stocks, mortgages, notes or other property of any kind, real or personal, suitable for the investment of trust funds;

(c) To cause any securities or other property, real or personal, belonging to the trust to be held or registered in the trustee's name or in the name of a nominee or in such other form as the trustee deems best without disclosing the trust relationship;

(d) To vote in person or by general or limited proxy, or refrain from voting, any corporate securities for any purpose; to exercise or sell any subscription or conversion rights; to consent to and join in or oppose any voting trusts, reorganizations, consolidations, mergers, foreclosures and liquidations and in connection therewith to deposit securities and accept or hold other securities or property received therefor;

(e) To lease trust property for any period of time though commencing in the future or extending beyond the term of the trust;

(f) To borrow money from any lender, including a trustee hereunder individually, extend or renew any existing indebtedness and mortgage or pledge any property in the trust.

******** *(Trust Agreement - Page Five)* *********

(g) To sell at public or private sale, contract to sell, convey, exchange, transfer and otherwise deal with the trust property and any reinvestments thereof from time to time for such price and upon such terms as the trustee sees fit;

(h) to employ agents, attorneys and proxies and to delegate to them such powers as the trustee considers

desirable, and to designate a deputy for a safe deposit box;

(i) To compromise, contest, prosecute or abandon claims in favor of or against the trust;

(j) To divide or distribute the trust property in undivided interests or in kind, or partly in cash and partly in kind, and to sell any property in order to make division or distribution;

(k) To deal with, purchase assets from, or make loans to, the fiduciary of any trust made by us or any member of our family or a trust or estate in which any beneficiary under this declaration has an interest, though the trustee hereunder is such fiduciary, and to retain any property so purchased;

(l) To establish out of income and credit to principal reasonable reserves for depreciation, obsolescence and depletion;

(m) To transfer the situs of any trust property to any other jurisdiction as often as the trustee deems it advantageous for the trust, appointing a substitute trustee to himself to act with respect thereto; and in connection therewith, to delegate to the substitute trustee any or all of the powers given to the trustee, who may elect to act as advisor to the substitute trustee and shall receive reasonable compensation for so acting; and to remove any acting substitute trustee and appoint another, or reappoint himself, at will;

(n) To perform other acts necessary and appropriate for the proper administration of the trust, execute and deliver necessary instruments and give full receipts and discharges;

(o) To resign without order of court upon notice being given to those beneficiaries entitled to receive the income of the trust estate.

SECTION FOUR: REAL PROPERTY: As to any real estate conveyed to this trust, the interest of any beneficiary hereunder shall consist solely of the right to receive earnings, avails and the proceeds from rentals and from mortgages, sales or other disposition of said property, to manage and control said property as hereinafter provided, and to direct the trustee in its dealings with the title to said property as hereinafter provided. The said right in the avails of said property shall be deemed to be personal property and may be assigned and transferred as such; that in case of the death of any beneficiary hereunder during the existence of the trust, his or her right and interest shall pass under the terms of this trust; and that no beneficiary now has , and that no beneficiary hereunder at any time shall have any right, title or interest in or to any portion of said real estate as such, either legal or equitable, but only an interest in the earnings, avails and proceeds aforesaid.

******** *(Trust Agreement - Page Six)* ********

The trustee shall deal with the real estate and with any cash or other property or assets of any kind on the written direction of the then existing beneficiaries.

SECTION FIVE: TRUST AMENDMENTS: WE, BURR E. LEE, JR. and RUTH C. LEE, reserve the right at any time or times during both our lifetimes to amend, alter or revoke this Declaration in all or part. However, upon the death of BURR E. LEE, JR. or RUTH C. LEE, this trust may not be revoked or amended in regard to successor beneficiaries. The right to revocation is personal to the beneficiaries and may not be exercised involuntarily. All amendments or revocations shall be in writing.

IN WITNESS WHEREOF, we have signed this Declaration this 9th day of May, 1979."

signature - BEL Burr E. Lee, Jr.

signature - RCL Ruth C. Lee

STATE OF ILLINOIS:

COUNTY OF COOK: SS (sworn statement)

I, WILLIAM J. JOOST, notary public, hereby certify that BURR E. LEE, JR. and RUTH C. LEE, personally known to me to be the same persons whose names are signed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed the instrument as their free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal this 9th day of May 1979

signature - WJJ

Notary Public

My commission expires 5-7-81

WARRANTY DEED #1775675

BURR E. LEE, JR., an unmarried man, and BURR E. LEE, JR., Trustee of the Burr E. Lee, Jr. and Ruth C. Lee Self-Declaration of Trust No. 100331J, grant to BURR E. LEE, Jr. and MARIE HARRISON, as joint tenants with right of survivorship, whose address is 14 Timberwick Road, Santa Fe, New Mexico 87505, the following described real estate in Santa Fe County, New Mexico:

Commencing at an iron stake which is the beginning point and which is on the east side of "South Fork" entrance and exit road for Timberwick Village and which is identical with the Southwest corner of the Amended South Portion Tract 4 "Plat of Timberwick Village" as amended by Walter G. Turley, April 16 1947 and October 19, 1949; Thence from said beginning point and along the South Fork Road toward the Las Vegas Highway N. 27° 14' E. 95.8 ft. to an iron stake, the Northwest corner of this tract, and labeled "Theodore P. Newitts 1.0 acre South Portion Tract 4" on the plat referred to hereafter; thence S. 64° 24' E. 449.2 ft. to an Iron stake marking the Southeast corner of property owned by H.H. Pattison; thence S. 24° 22' W. 53.1 ft. to an iron stake; thence S. 5° 38' W. 40.16 ft. to a point from whence the Center of the Leisher Ell bears N. 45° E. 2.4 ft.; thence S. 5° 38' W. 106.58 ft. to an iron stake; thence S. 27° 56' W. 228.45 ft. (identical with Samuel P. Davalos survey April 8, 1963); thence along a new line S. 27° 6' W. 150.68 ft. to an iron stake set in the Southern line of the Davalos survey and lying N. 65° 31' W. 28.33 ft. from the South end of said line as surveyed by Jack Horne; thence N. 64° 24' W. 586.45 ft. along the original Southern line of the Davalos survey, to an iron stake, the Southwest corner of this tract, a point on the East side of the South Fork Road; thence along the East side of the South Fork Road N. 39° 23' E.326 ft. to an iron stake; thence

continuing along the East side of said South Fork Road N. 27° 14' E. 164.9 ft. to the point and place of beginning; all as shown upon "Plat Showing Survey of Properties for Theodore P. Newitts, Constance Mary Newitts, Portion of E.T. Seton Lands, Timberwick Village, within the Sebastian De Vargas, Section 20, T 16 N. R. 10 E., Santa Fe County, New Mexico", by Samuel P. Davalos from the survey of May 1946, 8 April 1963, and 18 June 1965, containing 7 acres more or less, after partition by Jack Horne 27 Oct. 1977.

with warranty covenants.

This deed amends and replaces the deed previously recorded to Book 1750 at page 959 of the records of Santa Fe County, New Mexico, dated day of April 20, 2000.

Executed this 12th day of June 2000.

[S I G N E D] BURR E. LEE, JR.

STATE OF NEW MEXICO)
COUNTY OF SANTA FE) ss:

The foregoing instrument was acknowledged before me this 12th day of June 200 by Burr E. Lee, Jr., individually and as trustee.

[S I G N E D] [FLETCHER R. CATRON]
Notary Public

[S E A L] FLETCHER R. CATRON NOTARY PUBLIC
My commission expires: June 2002
[S E A L]

COUNTY CLERK REBECCA BUSTAMANTE
SANTA FE COUNTY
Recorded: 12 day of June 2000 at 3:01 PM

[S I G N E D]

Catron, Catron & Sawtell, A Professional Association [Ltrhd]

September 25, 2000

Karen Aubrey, Esq.
Post Office Box 8435
Santa Fe, New Mexico 87504-8435

Dear Karen:

You are correct that I represent Marie Harrison in her fiduciary capacity and not in her individual capacity. I have forwarded you letter to her, and I have suggested to her that she retain personal counsel. As attorney for the estate, I note your Demand for Notice and will comply with it, of course. With respect to the Claim Against the Estate, you should know that your clients and the other children are getting *all* the estate assets through the trust, with the exception of some tangible personal property of insignificant value. There is therefore nothing left in the estate for your clients to claim against.

I think I should also mention that, while Burr Lee certainly felt close to Ms. Harrison and felt grateful to her for her companionship and assistance, I am not at all sure their relationship was as you have described it; Burr Lee, certainly, never described Marie as his "paramour," his partner, or anything other than his friend.

Sincerely,

[S I G N E D]

Fletcher R. Catron

FRC:ps

cc: Marie Harrison

RECEIVED [Karen Aubrey]
SEP 26 2002

Catron, Catron & Sawtell, A Professional Association [Ltrhd]

March 15, 2000

Mr. Burr Lee
14 Timberwick Road
Santa Fe, New Mexico 87505

Dear Mr. Lee:

I have received your letter of March 13. It seems to me that the differences of opinions you have received relate to the interpretation of the language you underline in Section 5 of the trust. I read it literally; the other attorneys seem not to do so.

As I read the language, you may not revoke or amend the trust "in regard to successor beneficiaries." That means that you may amend and modify the trust however you want except that the successor beneficiaries must not be altered. You will notice that my draft of this trust, although completely restated, kept the original beneficiaries. I did this because of this section in the original trust.

As we discussed when we first met, my intention was to alter the ownership of your assets to keep in the trust those items which you wanted to go to Ruth's children, and to remove from the trust those items (only your house) that you did not want to have go upon your death to her children. In this way, you did not alter the trust with respect to successor beneficiaries, although the successor beneficiaries of the trust would not necessarily obtain 100% of your assets.

I have no doubt that all of your assets, including the trust assets, can be used now by you, in any way you wish during your lifetime. If all those assets are left to Ruth's children, as the trust dictates, there will be absolutely no problem, no matter what you have done in the past. If, though, some of your assets do not go to Ruth's children, then I believe that you open your estate

up to the possibility of some sort of litigation. This is after your death, of course.

I believe I discussed with you fully the possibility that you would transfer the house out of the trust and into joint tenancy between you and your friend. This would give your friend the house upon your death, and it would avoid its being held in trust (and thus subject to beneficiary requirements) at the time of your death. If the transfer of the house into joint tenancy were simply a gift to your friend, I would have additional concerns, but our discussion was that it would be held in joint tenancy in consideration of your friend's obligation to care for you during your lifetime. I think that your wife's children can hardly complain if you make a transfer of the real estate in exchange for fair value.

At the same time, I felt that the different provisions of "The Burr Trust" may cause some problems. That is why I suggested that you transfer your condominium units from the Burr Trust back to the Burr and Ruth Trust. If, upon your death, you are left with a single trust, with the original beneficiary provisions, and nothing else, then you should not have a problem. If, though, some of your property has been transferred out of the trust, clearly for the purpose of trying to avoid the provisions of the trust with respect to beneficiaries, you may have problems. Of course, you have to remember that all these problems would come about only after your death; you will not be faced with them personally. Nevertheless, I think you consider these matters in arranging your affairs at the present time.

If you think we need to discuss this any further, please give me a call.

Sincerely,
[S I G N E D]
Fletcher R. Catron

FRC:mme

AFFIDAVIT

STATE OF NEW MEXICO)
)ss.
COUNTY OF BERNALILLO)

JAMES F. BECKLEY, Esq., being duly sworn, deposes and says that:

1. I am an attorney licensed by the Supreme Court of the State of New Mexico;

2. I have been actively engage in the private practice of law in the State of New Mexico since September 1969;

3. My practice focuses on estate planning, trusts, wills, estates, probate, and trust administration;

4. I have been a Fellow of the American College of Trust and Estate Counsel since 1993;

5. I have been a Legal Specialist in Estate Planning, Trusts, and Probate Law certified by the New Mexico Board of Legal Specialization since July 1, 1999;

6. I continue to maintain an "AV" rating by Martindale Hubbell;

7. I am listed in the Best Lawyers in America, 2007 edition, under the heading *"Trusts and Estates;"*

8. I have taught numerous legal education courses for lawyers, accountants, and trust officers since 1990 in the legal subjects of wills, trusts, estate planning, probate, and trust administration;

9. During my law career I have drafted and/or analyzed numerous trusts for clients including revocable trusts similar to the BURR C. *[sic]* LEE, JR. AND RUTH C. LEE SELF-DECLARATION OF TRUST NO. 10331J under trust agreement dated May 9, 1979;

10. The controlling consideration in determining the meaning of a donative document is the donor's intention and the donor's intention is given effect to the maximum

extent allowed by law (Restatement of the Law, Third, *Property - Wills and Other Donative Transfers*, Section 10.1, Comment *b.*);

11. The text of a donative document must be read in its entirety (Restatement of the Law, Third, *Property - Wills and Other Donative Transfers*, Section 10.2., Comment *b.*);

12. I have read and have become familiar with the terms of, the BURR C. *[sic]* LEE, JR. AND RUTH C. LEE SELF-DECLARATION OF TRUST 10331J under trust agreement dated May 9, 1979;

13. The pertinent sections of the BURR C. *[sic]* LEE, JR. AND RUTH C. LEE SELF-DECLARATION OF TRUST 10331J under trust agreement dated May 9, 1979, are as follows:

(A) TRUST DECLARATION: We, BURR E. LEE, JR. and RUTH C. LEE, as settlers, herewith transfer to ourselves as the trustee the ***SUM*** (emphasis added) of Ten ($10.00) Dollars ...

(B) SECTION ONE: TRUST BENEFICIARIES

1. During our lifetimes, the income from the trust shall be paid to us in convenient installments or otherwise as we may from time to time direct and also such ***SUMS*** (emphasis added) of principal ...

2.a. Commencing with the death of either BURR E. LEE, JR. or RUTH C. LEE ..... The trustee shall continue to pay income and ***SUCH SUMS*** (emphasis added) of principal to the survivor as requested;

(C) SECTION FOUR: REAL PROPERTY: As to any real estate conveyed to this trust, the interest of ***ANY*** beneficiary hereunder shall consist ***SOLELY*** of the ***RIGHT TO RECEIVE EARNINGS, AVAILS,*** and the ***PROCEEDS*** from rentals and from mortgages, sales, other disposition....and to direct the trustee in its dealings with the title to said property ***A S***

HEREINAFTER PROVIDED and that no beneficiary hereunder at any time shall have any right title or interest in to *[sic]* any portion of said real estate as such, either legal or equitable, but only an interests in the earnings, avails, and proceeds aforesaid. The trustee ***SHALL*** deal with the real estate and with any cash or other property or assets of any kind on the ***WRITTEN DIRECTION OF THE THEN EXISTING BENEFICIARIES*** (emphasis added);

(D) SECTION FIVE: TRUST AMENDMENTS: However, upon the death of BURR E. LEE, JR. or RUTH C. LEE, this trust may not be ***REVOKED*** (emphasis added) or amended in regard to successor beneficiaries;

14. The language of the BURR C. *[sic]* LEE, JR. AND RUTH C. LEE SELF-DECLARATION OF TRUST NO. 10331J under trust agreement dated May 9, 1979 (hereinafter referred to as the "Trust"), is unambiguous;

15. During the joint lifetimes of BURR E. LEE, JR. and RUTH C. LEE, they were the trustees and the income beneficiaries of the Trust;

16. During the joint lifetimes of BURR E. LEE, JR. and RUTH C. LEE, they retained the power to revoke and amend the Trust;

17. RUTH C. LEE died in August of 1992;

18. SECTION FIVE specifically states that, upon the death of either BURR E. LEE, JR. or RUTH C. LEE, the Trust may not be revoked;

19. Upon the death of RUTH C. LEE, BURR E. LEE, JR. continued to serve as the sole trustee, BURR E. LEE, JR. was the sole income beneficiary, and RICHARD A. VAN AUKEN, SUSAN L. VAN AUKEN, JUDITH G. VAN AUKEN, BURR JEFFREY LEE, CAROL L. BOYLE, AND ELIZABETH M. LEE became vested remainder beneficiaries;

20. Pursuant to SECTION ONE, Paragraph 2.a. of the Trust, BURR E. LEE, JR. was only entitled to income and such sums of principal from the Trust as he requested following the death of RUTH C. LEE;

21. SECTION FOUR of the Trust specifically limits a beneficiary's right in regards to any real property owned by the Trust to the earnings, avails, or proceeds attributable to any such real property;

22. SECTION FOUR of the Trust specifically states that "the interest of any beneficiary hereunder shall consist solely of the right...to direct the trustee in its dealings with the title to said property as *hereinafter provided*;"

23. The last sentence of SECTION FOUR of the Trust states "the trustee shall deal with the real estate and with any cash or other property or assets of any kind on the *written direction* of the then existing *beneficiaries*;"

25. *[sic]* Upon the death of RUTH C. LEE, the Trust became irrevocable;

26. The intention of the settlers of the Trust, i.e. BURR E. LEE, JR. and RUTH C. LEE, is clear from the document known as the BURR C. *[sic]* LEE, JR. and RUTH C. LEE SELF-DECLARATION OF TRUST NO. 10331J under trust agreement dated May 9, 1979;

27. Such intent was to provide for the benefit of both BURR E. LEE, JR. and RUTH C. LEE during their joint lifetimes, to provide for the survivor upon the death of either of them, and to distribute the assets of the Trust, including real property located in Timberwick, New Mexico, to the vested remainder beneficiaries;

28. The terms of the Trust mean what they say;

29. The phrase "*such sums of principal*," as set forth in SECTION ONE, Paragraph 2.a. of the Trust, only entitled BURR E. LEE, JR., during his lifetime following the death of Ruth C. Lee, to distributions of cash and not to

distributions of assets in kind, especially in light of the use of the word "*sum*" in the preamble of the Trust which refers to the settlers transferring the sum of "Ten ($10.00) Dollars to themselves as trustee;

30. The terms of the Trust specifically preclude a trustee from distributing any interest in any real property owned by the Trust outright to any beneficiary, e.g., BURR E. LEE, JR., as the trustee, could not transfer the real estate located in Timberwick, New Mexico, to himself as the sole income beneficiary during his remaining lifetime following the death of Ruth C. Lee without violating the terms of the Trust;

31. The terms of the Trust specifically preclude a trustee from dealing in any manner with any asset of the Trust, including real property, without the written direction of ALL of the beneficiaries, e.g., BURR E. LEE, JR., as the trustee could not distribute the real estate located in Timberwick, New Mexico, to himself as the sole income beneficiary during his remaining lifetime following the death of Ruth C. Lee without first obtaining the written direction of BURR E. LEE, JR., RICHARD A. VAN AUKEN, SUSAN L. VAN AUKEN, JUDITH G. VAN AUKEN, BURR JEFFREY LEE, CAROL L. BOYLE, and ELIZABETH M. LEE;

32. The transfer of the real property located in Timberwick, New Mexico, from the Trust to BURR E. LEE, JR. and MARIE ANTOINETTE HARRISON, revoked the Trust as it related to the vested interests of the remainder beneficiaries in said real property;

33. Fletcher Catron, Esq. knew that the transfer referenced above in Paragraph 32 was problematic as evidenced by his letter to Burr E. Lee, Jr. dated March 15, 2000, which is attached as Exhibit 1 to the Affidavit of Fletcher R. Catron, Dated January 30, 2007 which is attached to Defendant Catron's Memorandum Brief in

Support of Motion For Summary Judgment which is attached to Defendant Catron's Motion For Summary Judgment. Such letter in pertinent part states the following:

(A) "It seems to me that the differences of opinions you have received relate to the interpretation of the language you underline in Section Five of the trust;"

(B) If, though, some of your assets do not go to Ruth's children, then I believe that you open your estate up to the possibility of some sort of litigation. This is after your death, of course;"

35. *[sic]* Fletcher R. Catron, Esq., by agreeing to represent Burr E. Lee, Jr. as the sole successor Trustee of the Trust, assumed responsibilities and owed duties to the vested remainder beneficiaries. See e.g., "We agree with the California courts that when an attorney represents a trustee in his or her capacity as trustee, that attorney assumes a duty of care and fiduciary duties toward the beneficiaries as a matter of law," *Charleston v. Hardesty* 839 P.2d 1303 (Nev. 1992);

36. Fletcher R, Catron, breached the duty of care and the fiduciary duties owed to the vested remainder beneficiaries of the Trust by assisting Burr E. Lee, Jr. with the transfer of the real property located in Timberwick, New Mexico, from the Trust to Burr E. Lee, Jr. and Marie Antoinette Harrison, in violation of the clear and unambiguous terms of the Trust;

37. Fletcher R. Catron, Esq., knowing that the transfer of the real property located in Timberwick, New Mexico, from the Trust to Burr E. Lee, Jr. and Marie Antoinette Harrison was problematic, should have sought the consent of all of the vested remainder beneficiaries to such transfer, and absent the unanimous consent of all such beneficiaries to such transfer, he should have requrested that a court of competent jurisdiction resolve the issue

with notice of such request being provided to all interested parties.

38. In my opinion, a court would not have authorized the transfer of the real property located in Timberwick, New Mexico, from the Trust to Burr E. Lee, Jr. and Marie Antoinette Harrison over the objections of any of the vested remainder beneficiaries without adequately protecting the interests of such vested beneficiaries;

39. One of the purposes of the Uniform Probate Code of New Mexico is to discover and make effective the intent of a decedent in the distribution of his property (Section 45-1-102(B)(2) N.M.S.A. 1978);

40. Fletcher R. Catron, Esq., by breaching his duties owed to the vested remainder beneficiaries of the Trust in assisting Burr E. Lee, Jr. in transferring real property in clear violation of the terms of the Trust, by failing to adequately advise the successor trustee of the vested remainder beneficiaries of the Trust of the violation of the terms of the Trust as a result of the transfer of the real property located in Timberwick, New Mexico, and by failing to correct such violation during the probate administration of the Estate of Burr E. Lee, Jr. deceased, engaged in fraud that avoided or circumvented the purposes of the Uniform Probate Code of New Mexico so as to implicate the application of Section 45-1-106 N.M.S.A. 1978;

41. Karen Aubrey, Esq. failed to preserve the claims of the Trust in the probate proceeding by failing to file a petition for allowance of claim after such claim was denied by Fletcher R. Catron, Esq.;

42. On September 23, 2002, Karen Aubrey, Esq. on behalf of Gretchen Van Auken, Susan Van Auken, Judith Alexander, Betsy Lee Joppe, and Richard Van Auken, filed a Demand for Notice and Claim Against the Estate of Burr E. Lee, Jr. alleging that the Estate was liable to

the claimants in an undetermined amount as successor beneficiaries of the Trust;

43. On October 9, 2002, Fletcher R. Catron, Esq. on behalf of Marie Antoinette Harrison, the duly appointed Personal Representative of the Estate of Burr E. Lee, Jr., filed a Notice of Disallowance of Claim that disallowed the claim filed by Karen Aubrey, Esq.;

44. Section 45-3-806(A) N.M.S.A. 1978 states that "Every claim that is disallowed in whole or in part by the personal representative is barred so far as not allowed unless the claimant files a petition for allowance in the district court or commences a proceeding against the personal representative not later than sixty days after the mailing of the notice of disallowance;"

45. Pursuant to Section 45-3-806(A), Karen Aubrey, Esq. had until December 8, 2002, to file a petition for allowance of the claim that she filed on September 23, 2002, and that was disallowed by Fletcher R. Catron, Esq. on October 9, 2002; and

46. Karen Aubrey, Esq. failed to file a petition for allowance of the claim that she filed, and she moved to withdraw as counsel for Gretchen Van Auken, Susan Van Auken, Judith Alexander, Betsy Lee-Joppe, and Richard Van Auken as beneficiaries for the Trust, which the Court granted by order filed on March 5, 2003;

47. The failure of Karen Aubrey, Esq. to inform the vested remainder beneficiaries of the Trust of her failure to file a petition for allowance suggests that she falsely represented a matter of fact by concealment of that which should have been disclosed so as to implicate the application of Section 45-1-106(A) N.M.S.A. 1978; and

48. The failure of Karen Aubrey, Esq. to "flag any specific violations of the Trust and without mentioning any responsibility for the Timberwick transfer which might rest with Catron" (see Paragraph 7 of Complaint for

Damages and Other Relief From Probate Fraud (§45-1-106(A), Attorney Deceit, and Collusion (§36-2-17)) suggests that she falsely represented a matter of fact by concealment of that which should have been disclosed so as to implicate the application of Section 45-1-106(A) N.M.S.A. 1978;

Further Affiant Sayeth Not.

Dated: April 2, 2007 By: [S I G N E D]
James F. Beckley, Esq.
Attorney at Law

STATE OF NEW MEXICO) ss.
COUNTY OF BERNALILLO)

On April 2, 2007, before me, the undersigned, a Notary Public in and for the County of Bernalillo, State of New Mexico, personally appeared James F. Beckley, Esq., personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year in the is *[sic]* certificate first above written.

[S E A L] [S I G N E D] [KATRINA VOTH] Notary Public
State of New Mexico My Commission Expires 01-30-10

FILED: FIRST JUDICIAL DISTRICT COURT
2007 SEP 21 AM 7:52

FIRST JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF SANTA FE

Case No. D-0101-CV-2007-001162

BURR E. LEE, JR., and
RUTH C. LEE SELF-DECLARATION
OF TRUST, by and through itself and/or
By and through RICHARD VAN AUKEN,
Trustee,

Plaintiffs

v.

CATRON, CATRON & POTTOW, P.A.
FLETCHER R. CATRON, and
KAREN AUBREY.

Defendants.

NOTICE TO WITHDRAW MOTION ALLOWING WITHDRAWAL OF COUNSEL

William Gilstrap and Daymon Ely are withdrawing their Motion Allowing Withdrawal of Counsel in the above referenced matter.

WHEREFORE, Plaintiff's counsel requests that the Motion Allowing Withdrawal of Counsel be withdrawn.

William G. Gilstrap
P.O. Drawer H, Albuquerque, NM 87103
(505) 842-8600
and
[S I G N E D]
Daymon B. Ely
1228 Central Ave. SW, Albuquerque, NM 87102
(505) 248-0370
Attorneys for Plaintiff

AFFIDAVIT

STATE OF WISCONSIN)
) ss
COUNTY OF VILAS)

WILLIAM JOOST, Attorney at Law, being duly sworn, deposes and says that:

1. I am an attorney licensed by the Supreme Court of the State of Wisconsin.

2. I have been actively engaged in the practice of law in the State of Wisconsin since 1986 and, prior to that, in the State of Illinois beginning in 1969.

3. My areas of practice in Illinois and Wisconsin were and are probate, wills, estate planning, real estate, business and commercial law, corporations, condominium conversions and bankruptcy.

4. In 1979 I prepared and witnessed the execution of a trust instrument, the "Burr E. Lee, Jr. and Ruth C. Lee Self-Declaration of Trust No. 10331 J."

5. I have recently reviewed a copy of this six-page trust instrument as it was executed on May 9, 1979 by Ruth C. Lee and Burr E. Lee in my law office in Park Ridge, Illinois.

6. I have also recently examined a seven-page affidavit made on April 2, 2007 by James F. Beckley, Esq. of Albuquerque, New Mexico, which affidavit addresses the language in this 1979 trust instrument.

7. I find Mr. Beckley's affidavit to be accurate and correct in the several paragraphs which analyze the meaning of the language in the trust instrument. See ¶¶ 13-16, ¶¶ 18-26, and ¶¶ 28,29 of Mr. Beckley's affidavit.

8. Given that Ruth Lee died in 1992 as stated in ¶ 17 of the affidavit and that certain real property ("Timberwick") was held in trust as implied in ¶ 27 of the

affidavit, I also find as accurate and correct and correct *[sic]* Mr. Beckley's analysis of the effect of trust language contained in ¶¶ 30-32 of his affidavit.

9. I agree with Mr. Beckley that the language of the trust instrument does not permit the surviving co-settlor to invade the principal of the trust estate through property transfer absent written approval from the seven Van Auken/Lee children who were named as beneficiaries and whose interests, after the death of Ruth Lee, had become vested.

10. After Ruth Lee's death, Burr Lee did not have the power to revoke or amend the trust instrument without written approval of the seven beneficiary children.

11. From my re-reading of the trust instrument and from my personal recollection of the circumstances of its execution nearly thirty years ago, there was no expressed intent to allow the surviving co-settlor an unlimited ability to invade the principal of the trust estate, especially the real property placed in trust which was to become the inheritance of the Lee and Van Auken children.

12. My recollection of the circumstances is as follows:

A. I had prior dealings with Burr Lee since he was a real estate salesman in Park Ridge, Illinois.

B. The trust was drafted with the understanding that this was a second marriage for Burr Lee and Ruth Lee.

Further Affiant Sayeth Not.
Dated this 23rd October 2008
[S E A L] [S I G N E D] William Joost, Attorney at Law
Subscribed and sworn to before me This 23rd day of October, 2008, Amy M. Franzen, Notary Public, Vilas County, Wisconsin, My Commission expires: 07/25/10

Excerpts: from pleading entered on July 12, 2004
First Judicial District Court
Alexander et al. v. Harrison (2004)
Defendant's Response to Plaintiff's Rule 1-056 Motion for Summary Judgment That Transfers Were Unlawful
By: Peter F. Wirth for Defendant Marie Harrison
(attachment to pleading)

AFFIDAVIT OF FLETCHER R. CATRON

A. Trust and Estate Credentials: p. 1, ¶1

1. My name is Fletcher R. Catron. I am an attorney licensed to practice law in the State of New Mexico. My practice over the last thirty years has focused primarily on estate planning, probate and real estate law. 1997-98 I served as the chair of the State Bar section on probate and real property.

B. Attorney-Client Relationship with Trustee: p. 1, ¶2

2. On or around August 29, 1999, Burr E. Lee, Jr. first came to my office to have me review his estate plan. As part of this review, he brought copies of his will dated May 9, 1979, the Burr E. Lee, Jr. and Ruth C. Lee Self-Declaration of Trust No. 10331J ("the Burr and Ruth Trust"), and the Burr E. Lee, Jr. Living Trust.

C. Legal Opinion on Trust Instrument: p. 2, ¶5

5. Regarding the issue of whether the Burr and Ruth Trust was irrevocable after Ruth Lee's death, I advised Mr. Lee that the only irrevocable provision addressed the beneficiaries.

D. Transfer of Trust Property: p. 2, ¶9

9. Subsequently, I prepared a deed transferring 14 Timberwick to Burr E. Lee, Jr. and Marie Harrison as joint tenants and prepared a new will for Mr. Lee to remove the article leaving 14 Timberwick to Marie Harrison at death.

Excerpts: from pleading recorded on October 12, 2004
First Judicial District Court
Alexander et al. v. Harrison (2004)
Transcript of Proceedings
By Loretta L. Branch, Reporter

A. Matters Under Consideration: p. TR-1, lines 14-19

On the 12th day of October 2004, at 10:28 a.m., this matter came for hearing on Plaintiffs' Motion for Summary Judgment; Defendant's Rule 1-012(B)(6)/Rule 1-056 Motion to Dismiss all Counts or in the Alternative to Dismiss Plaintiffs' Count Two, before the HONORABLE CAROL J. VIGIL, Judge of the First Judicial District, State of New Mexico, Division III.

B. Order of Consideration: p. TR-4, lines 1-6

THE COURT: Oh, welcome. Okay. These are Plaintiffs' Motion for Summary Judgment, and then we have another motion, 12(B)(6).

MR. WIRTH: Correct, Your Honor. I think that the 12(B)(6) motion is the Defendant's motion, which I think we're going to hear first, because it would be dispositive, and we wouldn't need the Plaintiffs' motion if it's granted.

THE COURT: All right. Mr. Wirth, you may proceed.

C. Comment on *In Re Burr E Lee Jr.* p. TR-31, lines 1-10

MR. WIRTH: . . The argument that somehow Marie Harrison was the personal representative and, therefore, it wasn't appropriate. I mean, how many cases do you get in a probate context where the first thing that's filed is a motion to remove the personal representative and appoint a special administrator? You know, we're not dealing with pro se litigants here. They had an attorney and they made decisions, tactical decisions, about how to proceed. I think that they characterized themselves as creditors, clearly, in the claim that they made. They, therefore, stepped into this unique probate world.

Excerpt: from pleading entered on August 10, 2006
First Judicial District Court
Van Auken v. Catron et al. (2006) [Record Proper 67]
Defendant Catron's Motion to Dismiss Claims of Trustee
By Michael T. Pottow for Defendant Fletcher R. Catron
pp. 1, 2

In New Mexico, only two types of legal representation are recognized: Litigants appearing *pro se* or those appearing through counsel of record. *In the Matter of Schmidt*, 1997-NMSC-008 at ¶ 13, 122 N.M. 770, 931 P.2d 1386 (1997) One reason for this rule is that when a licensed attorney represents a party, there are grounds to believe that the representative's character, knowledge and training are equal to the responsibility. *Id.* Applying this general rule more specifically, we see that an entity other than a natural person must be represented by counsel. For instance, a limited liability company must be represented by counsel. *Martinez v. Roscoe*, 2001-NMCA-083, 131 N.M. 137, 33 P.3d 887, and a corporation must be represented by counsel. *State ex rel. Norvell v. Credit Bureau of Albuquerque*, 85 N.M. 521, 514 P.2d 40 (1973).

While New Mexico courts have not addressed whether a trust must be represented by counsel, federal courts have, deciding that a trust may not be represented by a non-attorney but must have counsel to appear in an action. See *United States v. Henkel*, 1997 U.S. Dist LEXIS 4917; 79 A.F.T.R.2d (RIA) 2126 (E.D. Calif.1997); *Pacific Property Management v. Delta Investment*, 1994 U.S. Dist LEXIS 10593; 74 A.F.T.R.2d (RIA) 5654(E.D. Calif. 1994)

Excerpt: from pleading entered on September 11, 2006
First Judicial District Court
Van Auken v. Catron et al. (2006) [Record Proper 150]
Response to Defendant Catron's Motion to Dismiss Claims of Trustee
By Plaintiff Richard A. Van Auken, *pro se*, pp. 1, 2

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2. ... the attorney [for Defendant Catron] cites New Mexico cases for two different types of "entities:" corporations and limited liability corporations *[sic]*.

3. The "Burr E. Lee, Jr. and Ruth C. Lee Self-Declaration of Trust No. 10331J" (the "TRUST") . . . is neither a corporation or a limited liability [company]

5. ... the attorney [for Defendant Catron] opines that "there are grounds to believe" such counsel's "character, knowledge and training are equal to the responsibility."

6. . . . this would be the kind of responsibility Catron bore while advising the successor trustee of the TRUST when he arranged, in June 2000, to remove valuable property from the TRUST thereby eliminating intended benefit to seven other TRUST beneficiaries.

7. . . . the attorney [for Defendant Catron] cites a federal tax case from California [which] rule[s] that the nonlawyer trustee in that case could not represent one of the trusts in that legal proceeding. ... "A corporation or other entity may only appear by an attorney.["]

9. . . . the cited trust clearly qualified as an "entity" ... the TRUST in this Case is little more than a [sic] *agreement* signed twenty-seven years ago which Plaintiff, acting as successor trustee is attempting to validate in an action against those who have violated and/or failed to enforce its terms. The TRUST currently has no property, no bank accounts, no tax liabilities and no business operations of any kind. The TRUST's only legal footprint ... is solely within the proceedings of this Case as a written "agreement" which Plaintiff asserts has been violated . . .

Excerpts: from pleading entered on October 20, 2006
First Judicial District Court
Van Auken v. Catron et al. (2006)
Plaintiff's Motion to Determine Underlying Fraudulent Transfer and Other Pending Motions
By Plaintiff Richard A. Van Auken, *pro se*

A. Trust Language as Central Issue: pp. 2, 3; ¶¶ 4, 5, 8, 9

Serious Nature of Case and Priority Due Plaintiff's Motion

4. The claims brought by Plaintiff in this Case under NMSA §45-1-106A, Probate Fraud, and §36-2-17, Attorney Deceit and Collusion, are serious claims against each of the defendants.

5. The loss to Plaintiff of a single piece of valuable real property in Santa Fe is a similarly serious loss.

8. Most of the open questions as well as Plaintiff's claims can now be seen to rest on a single matter presently before the Court, namely, *Plaintiff's [Rule 1-056] Motion [for Summary Judgment That TRUST Terms Were Violated by Property Transfer].*

9. That the TRUST was violated by this real property removal is central to the §45-1-106A claim of Probate Fraud. The violation is also at the center of the §36-2-17 claim of Attorney Deceit and Collusion. The violation also colors all other matters, defenses and replies, motions and responses, presently open in this Case.

B. Failure to Explain Trust Language: pp. 3, 4 ¶¶ 12, 13

12. Responses to *Plaintiff's Motion* offered by Defendants include arguments that the language of the TRUST is ambiguous and also arguments that the language of the TRUST permitted the real property removal. These arguments fail to explain the overall construction of the TRUST language and ignore the clear constraints contained in the section on "Real Property." Defendants are among the best trust, estate and real

property attorneys in Santa Fe. It simply cannot be that difficult to determine the meaning of the six-page TRUST.

13. Responses to *Plaintiffs Motion* offered by Defendants include arguments which appear to ignore the TRUST altogether or to treat it as irrelevant. How can this be? Defendants' professional responsibility includes the interpretation of trusts which the State of New Mexico and the public in general depend upon them to do properly and conscientiously. Bankers must read the "pay to the order of" instructions on checks, underwriters must understand the terms of insurance policies and, as practicing trust, estate and real property attorneys, the Defendants, each of them, must be able to read and interpret the words in trust documents. With its words, the TRUST conveyed valuable property provided by two people in 1979 to other people after their death. Those words from 1979 should not be ignored. They cannot be treated as irrelevant in this Case. Their meaning must be established.

C. Responsibility Under State Law: pp. 4 ¶14

14. Two of the purposes of the New Mexico Probate Code cited in §45-1-102 are "to discover and make effective the intent of a decedent in distribution of his property" and "to facilitate use and enforcement of certain trusts." An important and enduring expression of intent which was available to the Defendants at all times during the Probate Case referenced above was the written TRUST agreement which had been created twenty years earlier. The New Mexico Probate Code would seem to encourage every trust and probate attorney practicing in the State of New Mexico to recognize and enforce such written expressions of intent. The Defendants in this Case, each of them, participated in the Probate Case, one as attorney for the Estate, another as personal attorney for the Personal Representative, a third as attorney for the TRUST, and the fourth, represented in this Case by his estate, as a "name partner" in both of the separate law practices of two of the other defendants as a result of having switched firms in

the middle of the Probate Case. The Defendants, each of them, from their general position as practicing trust and probate attorneys but also, more particularly, from their position in this Case, has a responsibility to properly interpret the meaning of the language of the TRUST.

D. Reference to Complaint: p. 5 ¶16

. . . [T]he determination of the meaning of TRUST language, now the subject of *Plaintiff's Motion*, was included in the *Complaint* and the *Amended Complaint* as the first part of the relief requested:

> A. Finding that the 12 June 2000 transfer of the Timberwick Property out of the TRUST to a TRUST beneficiary and non-beneficiary as joint tenants with right of survivorship violated the terms of a valid trust (the TRUST)

The facts not being in dispute and a solid prima facie showing having been made, *Plaintiff's Motion* seeks to establish this finding as a matter of law.

E. Justification for Hearing Priority: p. 5, ¶17

17. Three motions relating to the dismissal of these §45-1-106A and §36-2-17 claims are directly affected by a determination of *Plaintiff's Motion*. Both types of claims arise from the underlying fraudulent transfer of property presented in *Plaintiff's Motion*. In other words a proper determination of these three dismissal motions, items #3, #4, and #5 in Attachment L, requires or is advanced by a prior determination of *Plaintiff's Motion*.

F. Plea for Hearing Priority: p. 6

WHEREFORE, . . , Plaintiff asks the Court to give priority to a motion presently before the Court, *Plaintiff's Rule 1-056 Motion for Summary Judgment That TRUST Terms Were Violated by Property Removal*, and to consider arguments, to set a schedule for hearing(s), and to issue ruling(s) in accordance with this priority.

Excerpts: from pleading recorded on December 15, 2006
First Judicial District Court: Judge James Hall
Van Auken v. Catron et al. (2006)
Transcript of Proceedings
By Loretta L. Branch, Reporter

A. Announcement of Hearing Agenda: p. TR-5, lines 8-11

THE COURT: . . I think . . the appropriate thing is to turn to the Motions to Dismiss. Those . . should be heard before I turn to the issues related to summary judgment.

B. Trust is Not an Entity: p. TR-17, lines 3-11

MR. VAN AUKEN: I don't think any of the Defendants has ever offered any explanation as to why the trust is, in fact, an entity. I agree with the law. . . If you're an entity, you have to have a lawyer. This trust is not a corporation. It's far from a corporation. In fact . . all it is, is an agreement, which I'm attempting to enforce. An agreement written . . 26 years ago, that is now up . . for review.

C. Claims by Trustee and Beneficiary: p. TR-27, lines 9-13

MR. VAN AUKEN: .. the fraud charges [are] against everybody, both, personally, and from the trust in my capacity as trustee of the trust .. and as one of its . . beneficiaries.

D. Trust Construction, Responsibility: pp. TR-27, TR-28

MR. VAN AUKEN: The key to all of this, Your Honor, is that the trust was violated. And we don't know that yet, until you say so. And all [claims] revolve around what does this six-page document mean. That's the key. Once everyone knows this was violated, the first fraudulent transfer is established, the whole fraud of omission becomes clear, because they knew that, or they should have known that . . . they should have known what was in the trust.

[T]he law of probate is that you want to determine the intent of the deceased party. This [trust instrument] is the best statement of intent there is, and every one of the four Defendants are responsible for determining that in the probate court . . to you, the Court. They did not.

Excerpt: from pleading entered on March 5, 2007
First Judicial District Court
Van Auken v. Catron et al. (2006) [Record Proper 480]
Plaintiff's Motion for Continuance of Claims of Trustee
By Plaintiff Richard A. Van Auken, *pro se*
pp. 1, 2

2. Plaintiff knows that, in spite of extensive effort and expense, that no attorney will be making such entry. (See Attorney Contact List attached as Exhibit P.) Plaintiff has determined that the reason for this is that the claims raised in this Case are not only claims against attorneys, they are claims against officers of this Court and, as such, implicate the Court responsible for ruling in this Case in the very matters under consideration. Entry into this Case is viewed among New Mexico attorneys as "taking on the establishment" and most of those contacted rejected such entry out of hand. For those who considered entry at all, a variety of compelling reasons were given for rejection.

3. Plaintiff notes that his individual claims in this Case, made as a beneficiary of the TRUST, are still being considered, Plaintiff further notes that argument and trial in this Case under claims presented in the Complaint and Amended Complaint are exactly the same for the interests of the TRUST and those of the beneficiary. Both were damaged by defendants acts of fraud and/or evasion in the Probate Case involving the Estate of Burr E. Lee, Jr. The difference is that Plaintiff's individual interests in the claims would likely be one-seventh of the overall interests of the TRUST since the Plaintiff individually is one of seven beneficiaries of the TRUST.

Excerpt: from pleading entered on March 23, 2007
First Judicial District Court
Van Auken v. Catron et al. (2006) [Record Proper 526]
Defendant Catron's Response to Plaintiff's Motion for Continuance of Claims of Trustee
By Michael T. Pottow for Defendant Fletcher R. Catron
pp. 1, 2

Plaintiff ignores the body of law requiring licensed attorneys to represent entities other than individual, both for the protection of the parties and for the efficient operation of the justice system. See e.g. *In the Matter of Schmidt*, 1997-NMSC-008, 122 N.M. 770, 931 P.2d 1386 (1997). Moreover, Plaintiff attributes his inability to secure counsel because his alleged claims run against officers of the court. He fails to consider the possibility that no attorney has come forward to represent him as Trustee because his claims lack merit. Such a failure points out the need for licensed counsel in situations like this.

Full Excerpt: from pleading entered on April 10, 2007
First Judicial District Court
Van Auken v. Catron et al. (2006) [Record Proper 561]
Plaintiff's Reply to Defendant Catron's Response to Plaintiff's Motion for Continuance of Claims of Trustee,
By Plaintiff Richard A. Van Auken, *pro se*
pp. 1, 2

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1. Plaintiff's on-going effort to enforce the terms of the trust ("TRUST") in this Case has brought two major legal issues close enough to one another that they now appear to be joined in *Defendant Catron's Response to Plaintiff's Motion for Continuance of Claims of Trustee ("Catron's Response").* This response cites the same princip[les] upon which Plaintiff also relies: that licensed attorneys provide "protection of parties" and the "efficient operation of the justice system."

2. There are two major legal issues now very much before the Court: (i) "Were unambiguous terms of the TRUST violated by a property transfer executed in advance of a probate proceeding?" and (ii) "Will the claims of the trustee in this Case be extinguished?"

3. The irony brought out by *Catron's Response* is that the requirement to retain a licensed attorney to represent the TRUST is proving to be such a major issue in a Case alleging probate fraud by licensed attorneys against the interests of the TRUST and its beneficiaries. This Case, which is about the acts of licensed attorneys in a trust and probate matter, has seen several of months argument on dismissing claims brought by the trustee for the TRUST on the grounds that no attorney is present to protect the parties or to efficiently move this Case through the justice system.

4. In stating that "Plaintiff ignores the body of law requiring licensed attorneys to represent entities other than individuals," *Catron's Response* mis-presents the

facts. Plaintiff has not moved for a continuance of the claims of the trustee in avoidance or ignorance of the "body of law" but on the grounds that a great many members of Defendant Catron's own Section of the State Bar, the Section on Real Property, Probate and Trust *[sic]*, refuse to get involved with this Case. Knowledgeable, veteran trust and estate attorneys have refused the business. Another example from Plaintiff's "full court press" to get an attorney prior to March 5, 2007 is instructive.

The attorney contacted is a founding member of a large New Mexico firm with offices in Albuquerque and Santa Fe. Reached by phone at his office late in the day, he listened to and discussed all aspects of the Case for the better part of an hour. His conclusion was that something is not right with regard to the enforcement of the trust. He asked for e-mail copies of key documents. His short e-mail message the following day was short and to the point:

"Firm management has determined it does not want to be associated with this case. Sorry"

Plaintiff is not and has not argued that the Court ruling requiring an attorney was unreasonable. The ruling is very reasonable and fair. Instead, Plaintiff's argument in this and one previous motion on this matter has been that, because of the "toxic" nature of this Case, the ruling needed to account for the dearth of licensed New Mexico attorneys willing to help protect this particular "party." The claims of the trustee should not be extinguished because, in spite of exhaustive search, no lawyer could be found who was willing to defend them.

5. The legal issues of trust violation and licensed attorneys can now be seen to be joined together. It is reasonable to have a licensed attorney defend the trustee's claims of probate fraud based on previous

TRUST violation because at the beginning of the probate proceeding in this Case, *licensed attorneys associated with the law firm of Catron, Catron & Sawtell were the only persons (i) with full knowledge of the facts, (ii) trained to explain those facts to others, and (iii) aware of their duties under the Probate Code.* At the close of this probate proceeding the licensed attorneys then responsible for seeing it close properly were associated with the law firms of Catron, Catron & Pottow and Sawtell, Wirth & Biedscheid. Justice was not served in this probate proceeding and licensed attorneys are responsible - for both the problem and the solution.

6. Census data from 2000 shows the number of residential housing units in Santa Fe County to be 57,701 and that the median value of these units is $189,400. The average value is higher. In 2007 the number and median value have both increased so it would be accurate to state that there is more than $10 billion worth of residential property in Santa Fe County. Additional property values come from commercial property and vacant land. This information is relevant to this Case and to *Plaintiff's Motion for Continuance of the Claims of the Trustee* because a growing number of real property transactions and real property titles in Santa Fe County are handled through trusts and trust agreements similar to the TRUST and the TRUST Agreement in this Case. Preliminary review of records in the Office of the County Clerk indicate that more than 25% of all property transactions in Santa Fe County now involve trusts. Since licensed attorneys are ultimately responsible for all of these trusts, it is entirely reasonable that licensed attorneys should get involved with the present Case to determine what other licensed attorneys did with one such trust, the TRUST. There is far more at stake here than the claims in the present Case.

7. Defendant Catron's assertion that Plaintiff "fails to consider the possibility that no attorney has come forward to represent him because his claims lack merit" is wishful speculation. Plaintiff has talked personally with dozens of New Mexico attorneys and lack of "merit" is not the problem. Extreme reluctance to confront a colleague on a matter of consequential trust interpretation is the problem.

8. On March 22, 2007 Plaintiff met in Albuquerque with two licensed attorneys, one of which had been (and is) retained and paid as an expert witness in this Case and the other has been engaged to enter this Case on a contingent fee basis. At some expense, Plaintiff made a special trip to New Mexico for the sole purpose of this meeting.

9. An affidavit executed last week by the trust expert regarding the meaning of TRUST language lays to rest the idea that Plaintiff's Case is without "merit."

10. Attorneys contacted by the Plaintiff will attest to the substantial pressures they face in getting involved with this Case.

11. Extreme reluctance and substantial pressures are not present in most cases where licensed attorneys are needed to protect parties and for efficient judicial processes. They are only present in this Case because licensed attorneys have protected themselves instead of "parties" and have obstructed rather than enabled justice.

Excerpt: from pleading entered on April 26, 2007
First Judicial District Court
Van Auken v. Catron et al. (2006) [Record Proper 615]
Second Affidavit of James F. Beckley, Esq., pp. 1, 2
Plaintiff's Supplemental Brief in Support of Plainitff's Reply to Defendant Catron's Response to Plaintiff's Motion for Continuance of Claims of Trustee, Exhibit R
By Plaintiff Richard A. Van Auken, *pro se*

5. Plaintiff retained me in mid-March 2007 as an expert witness in support of . . .William Gilstrap, Esq. . ;

6. Plaintiff had attempted to retain me for work on this Case beginning December 15, 2006, but I had initially resisted because of the distasteful nature of the claims alleged . . in the Case and because of my friendship with Defendant Fletcher R. Catron, Esq. . ."

7. My first knowledge of the underlying facts of this Case occurred in May 2003 when I received a phone call from attorney Jonathan M. Diener of Silver City requesting review of the Trust agreement for a suit by his clients who are beneficiaries of the Trust against the former Personal Representative of the Estate . . . ;

8. In April 2004, I .. gave my opinion to Mr. Diener that the transfers of real property comprising the corpus of the Trust detailed in that case were not permitted by the language of the Trust.

9. I was paid $500 by Mr. Diener for my review of the Trust and my opinions;

10. Subsequent expert testimony was never requested by Mr. Diener;

11. On December 19, 2006, I received a call from . . Plaintiff in the present Case . . I turned down his request to represent the Trust in this Case on the basis that I do not sue attorneys, and I referred him to Mr. William Gilstrap, Esq. for such representation.

Excerpts: from pleading recorded on May 1, 2007
First Judicial District Court: Judge James Hall
Van Auken v. Catron et al. (2006)
Transcript of Hearing
By Colette Ortega-Mares, Reporter

A. Parties and Motions: p. TR-1, lines 1-25

THE COURT: Court's in session, we're on the record in Richard Van Auken vs. Fletcher Catron and others, D-0101-CV-200601509. Will Counsel enter their appearances for the record, please.

MR. ELY: Daymon Ely for the Plaintiff, Richard Van Auken.

MR. POTTOW: Michael Pottow on behalf of Fletcher Catron.

MR. BRANT. Your Honor, Jack Brant, and I also represent Mr. Catron.

THE COURT: I should note for the record Mr. Dixon and Ms. Aubrey are also present in the courtroom. We're scheduled on the Defendant Catron's Motion for Summary Judgment. I notice since the Motion has been filed there's also been a request for a complaint and intervention on behalf of the Trust. So I guess, I didn't see a response to that Motion to Intervene, so I'm sort of curious what the parties' position is on that, Mr. Brant?

MR. BRANT: I'm going to be representing Mr. Catron as to that Motion. The Plaintiffs or the Movants gave me an extension until today to file my opposition, and I'll get it filed today.

THE COURT: Okay, so that will be an opposed Motion.

B. Effect of Ambiguity Ruling: p. TR-5, lines 7-18

MR. POTTOW: This Court has ruled, and I believe it is law of the case, that the trust itself is ambiguous, and that it is capable of more than one reasonable interpretation. The Court so found in denying Mr. Van Auken's Summary Judgment Motion, I think we can rely on that at this point, and that Mr. Catron, stating to Mr. Lee, you can, in my opinion, you can transfer this

property, cannot be an untrue statement, it is an attorney statement of opinion, this Court has said that yes, the trust can be read that way, it can also be read another way. That action in itself cannot be the basis of fraud claims that Mr. Van Auken is asserting.

C. Representation of Trustee Attorney: p. TR-14, lines 7-18

THE COURT: Mr. Ely, before you start, I just want to make sure of your representation clearly in the complaint and intervention, you seek to represent the trust.

MR. ELY: We also, on Thursday we filed an entry of appearance, I checked with the Court, it has been posted, Ms. Gilstrap and I also represent Mr. Van Auken.

THE COURT: So I guess from here out Mr. Van Auken, individually is not pro se, and all future pleadings will be filed through you.

MR. ELY: That's correct.

D. Claims in Van Auken v. Catron: pp. TR-17 thru TR-20

MR. ELY: That is what raises the issues of facts in this case. The fact is, is that here you have a lawyer that is in a position where he knows or should know that this trust is being violated; he puts it in the letter to his client; he does nothing to alert the remainder beneficiaries. When Mr. Lee dies, and they come before him and the successor trustee, Gretchen Van Auken and says, you know, I don't think this is right, he says in effect, yes, it is, it is fine, and then goes and represents the other party. This is fraud, this is fraud by representation and it is also fraud by omission. The fact is he had a duty to tell the remainder beneficiaries what was going on; he had a duty notify them when this happened, the Motion for Summary Judgment should be denied, your Honor.

THE COURT: I have a question, I'm still not quite sure, even understanding your argument, how this would fit under 36-2-17 regarding the actions of attorneys and how there could be a claim under that statute.

MR. ELY: I'll go right to Mr. Beckley's affidavit. He says in Paragraph 35, Fletcher Catron, by agreeing to represent By*n [sic]* Lee as the sole successor of the Trustee, assumed responsibility and owed duties to the vested remainder beneficiaries. Then he says, We agree with California Courts that when an attorney represents a trustee in his or her capacity of trustee, that attorney assumes a fiduciary responsibility toward the beneficiary as a matter of law. When they cited this statute in their Motion for Summary Judgment, they said it wasn't part of any judicial proceeding, and that's why they were entitled to Motion for Summary Judgment. Mr. Beckley puts that right at issue, he says when you're probating the estate, you have a duty to the remainder beneficiaries, you have to tell them what's going on, and at the time that he represented Mr. Lee, he had a duty to tell them and get their written permission in both cases. This is deceit, it may not or may not be collusion, depending on what we discover in discovery, but it certainly is fraud by silence and then by the representations that he's made to Gretchen Van Auken.

THE COURT: Why would that not be a breach of fiduciary duty or fraud as opposed to a statutory claim under 36-2-17?

MR. ELY: Well, it says if attorney is guilty of deceit or collusion or consent, thereto with the intent to deceive the Court, Judge or party, he shall forfeit to the injured party treble damages to be recovered in a civil action. Here in this case what Mr. Beckley has said is he's committed deceit in a judicial action in the probate of the trust, by not alerting the vested beneficiaries to what was going on, even when they asked him. They say, is this a problem, oh, no, this is not a problem. That's fraud. At that point this is not an attorney's opinion based on subsequent actions. He is involved in the activities that led to the question that was asked by the remainder beneficiaries.

He sits down with Mr. Lee and does this when he knows there's a problem, and he says to Mr. Lee, it is a problem, but it will be after your death. So he is actively involved in it, and then when the remainder beneficiaries come to him and say, is there a problem, he says no.

THE COURT: So your interpretation of the statute is anytime an attorney commits fraud, it is going to fit under 36-2-17 and create treble damages?

MR. ELY: If, I agree with them if it involves the one question in New Mexico that New Mexico's interpreted statute to say if it is involved in a judicial proceeding, and certainly the probate, the administration of a probate is a judicial proceeding, and in this case he's actively involved in that two separate occasions, by setting it up, and then in the actual administration of the probate when he sits down with the actual successor trustee, so I think in that situation, yes, 36-2-17 would apply.

E. Court Ruling on Deceit and Collusion: p. TR-23, TR-24

THE COURT: The matter comes before the Court on a Motion for Summary Judgment by Mr. Catron. Part of the difficulty I have with this is the way the case has been pled, it poses certain problems, but I will try to address it as effectively as I can to perhaps get the case moving on track.

First of all, I do not believe, on the undisputed facts or any set of facts really argued by Mr. Ely, that there is a basis for a claim under Section 36-2-17. There simply is not a set of facts that would establish the existence of some sort of collusion with the intent to deceive a party or the Court. I really think that Plaintiff here attempts to read that statute far more broadly than it was intended when is passed, when it was adopted. So first, I do grant Summary Judgment on behalf of Mr. Catron as to any claims that exist under Section 36-2-17.

Excerpts: from pleading entered on May 3, 2007
New Mexico Court of Appeals
Van Auken v. Catron et al. (2006) [RP 679]
Defendant Fletcher R. Catron's Response in Opposition to Motion to Intervene
By: Jack Brant for Fletcher R. Catron

A. Trust is Not an Entity that Can Sue: p. 3, ¶2

The Trust's Motion to Intervene should be denied because the Trust is not an entity that can sue and be sued. Thus both the motion to intervene filed by the Trust and the Trust's proposed Complaint in Intervention, are invalid.

> [T]rusts have no standing to sue or be sued as legal entities. See *Northern Acceptance Trust v. AMFASC Inc.*, 51 F.R.D. 487, 489 (D.Hawaii 1971) (trust "has no standing to sue or be sued as a legal entity and likewise cannot do for others what it cannot do for itself"); *Yonce v. Miners Memorial Hospital Assn.*, 161 F.Supp. 178, 188 (W.D. Va. 1958) ("A Trust is a fiduciary relationship by which the trustees hold title to property for the benefit of others, and a suit by strangers to the trust must be brought against the trustees thereof individually and not against the fictional entity"); Hershel California Food Products Co. v. Hunt Foods, Inc. 119 F.Supp. 603 (N.D. Cal. 1954) (:Under . . the Federal Rules of Civil Procedure . ., the trustee, rather than the trust itself, is the proper party to a legal action").

B. Trustee is Legal Owner of Trust Property: p. 4, ¶3

In *McBee v. Gustaaf Vandeenocke Revocable Trust*, 1998 WI, 201743 (Mo. App.), the court stated:

> It is well settled in Missouri that a trust is not a legal entity. The Trustee is a legal owner of the trust property, in which the beneficiaries have equitable ownership. Thus, the trustee in the case at bar, as record title holder of the dispouted land,

is an indispensable party. The only judgment which could affect real estate belonging to a trust is one entered against the trustee, the legal owner of the property. Here, the trial court's judgment as to the real estate was against the trust, not the trustee. Thus, the judgment has no effect on the title of the property, in that it was not against the trustee, the titleholder of record.

C. New Mexico Uniform Trust Code: p. 4, ¶4

The New Mexico Uniform Trust Code, NMSA §§ 46A-1-101 et seq. Is consistent with these authorities that it is the trustee, not the trust itself, that may bring a lawsuit. NMSA Section 46A-3-303D, "Representation by fiduciaries and parents," provides: "a trustee may represent and bind the beneficiaries of the trust." . . . Section 46A-8-811, Enforcement and defense of claims," provides: "A trustee shall take reasonable steps to enforce claims of the trust."

D. Real Party in Interest: p. 5, ¶4

Numerous New Mexico cases have set forth the test for determining a "real party in interest," as follows: Whether one is the real party in interest is to be determined by whether one is the owner of the right being enforced or is a position to discharge the defendant from the liability being asserted in a suit. See e.g. *Edwards v. Mesch*, 107 N.M. 704, 763P.2d 1169 (1988)

E. Relationship to *Pro Se* Pleadings: p. 6, ¶2

[T]his Court may legitimately inquire why the trustee has not brought the claim here. The obvious answer is that the trustee was given until March 5, 2007 by this Court to obtain counsel to pursue the trustee's claims on behalf of the Trust in this lawsuit. Order Dismissing Claims of Trustee, entered February 8, 2007. The trustee obviously did not meet that deadline. Thus, the Motion . . is a misplaced effort . . to do and end run around the referenced court order . .

Excerpt: from pleading entered on July 2, 2007
New Mexico Court of Appeals
Van Auken v. Catron et al. (2006)
Docketing Statement for Plaintiff's Appeal of Order Denying Plaintiff's Motion for Partial Summary Judgment
By Plaintiff-Appellant Richard A. Van Auken, *pro se*
pp. AA-2 to AA-6

Statement of the Case

This Case is a civil proceeding seeking damages and forfeiture and is brought by Plaintiff as trustee and beneficiary of a family trust against four defendants each of whom is a licensed New Mexico attorney. The *Complaint* and *Amended Complaint* cite two separate statute-based claims which arise, generally, from improper transfer of the family home and other real property out of the trust and, specifically, from intentional legal abuse and obstruction of the trust contract. This abuse and obstruction blocked correction of the trust property transfer violations during and after the probate proceeding created by the death of the surviving co-settlor of the trust in 2002.

In effect, this Case seeks belated enforcement of the terms of the family trust and, using NMSA 45-1-106A and NMSA 36-2-17, seeks to hold the defendants to account for the lack of effective earlier enforcement.

A trust is a contract between its settlor[s] and its trustee[s] and the contract terms are often binding on the trustee[s] after the settlor's [or settlors'] death. In 2002, immediately after the death of surviving co-settlor Burr E. Lee, Jr., the new trustee of the *Burr E. Lee, Jr. and Ruth C. Lee Self-Declaration of Trust No. 10331J* ("the TRUST") discovered that title to real property held under the contractual terms of the TRUST had been transferred to someone who was not a beneficiary named in the TRUST. In fact, the new trustee found that title to this

property was held by the hospice nurse who had attended to Ruth C. Lee, the other co-settlor, at her death in 1992. Language in one section of the TRUST covering real property prohibits such transfer and language in another section covering trust amendments binds a surviving co-settlor to this prohibition.

The new trustee in 2002 should have been able to correct the violations but legal advice which should have been available to her was either withheld or configured in opposition to her interests as trustee of the TRUST during the probate of the Estate of Burr E. Lee, Jr., her predecessor as trustee. And although she tried, she was unable to obtain judicial review of the TRUST in a subsequent post-probate proceeding against the hospice nurse.

The New Mexico Probate Code sets as one of its underlying purposes the determination of the intent of a decedent with respect to the distribution of his property and the TRUST, executed in 1979, was a binding expression of such intent for the surviving co-settlor, Burr E. Lee, Jr.. The Probate Code also specifies remedies available to those damaged from the "[e]ffect of fraud or evasion" in a probate proceeding (NMSA §45-1-106A).

Blocking enforcement of the TRUST contract during and after the probate proceeding which followed the death of Burr E. Lee, Jr. in 2002 required cooperation between different interests against the those of the TRUST and these cooperating interests were represented by the defendants or they directly influenced the defendants. The defendants worked together to block the trustee's attempts to correct TRUST violations. New Mexico Statutes specify remedies available to those damaged from such attorney "[d]eceit or collusion" (NMSA §36-2-17).

Common law claims in a *Second Amended Complaint* recently filed in the trial court on behalf of the Plaintiff by William Gilstrap, Esq. are separate from the *pro se*

statutory claims of the *Complaint* and *Amended Complaint* upon which the February 8, 2007 rulings and this appeal are based.

There is one other important facet of this Case. In using the TRUST contract and two New Mexico statutes to seek remedy for the loss of real property and time and expense, Plaintiff-Appellant has engaged the First Judicial District Court, the district court for Santa Fe, New Mexico where each of the four defendants practice law. This makes the enforcement sought in this Case quite difficult. If the misdirected TRUST assets had been in the form of cash or securities, then this Case - if it happened at all - would be asking for judicial review of and ruling on the actions of officers of the bank or brokerage firm responsible for the improper transactions. The district court would be reviewing the acts of officers of other organizations. In actuality this Case is about improper transfer of real property and the officers involved are officers of the Court itself. Judicial review is colored by a great many other relationships in a small bar. Accordingly, Plaintiff-Appellant relies on the precise meaning of the language in the TRUST, of the language in NMSA §45-1-106A and of the language in NMSA §36-2-17. These legal writings, all recognized in New Mexico courts, take on great significance. The standard of review must rest on these three pieces of legal language.

TRUST Language Review

As a predicate to the statutory claims in the *Complaint* and *Amended Complaint*, the trial court was asked for a summary or declaratory judgment that a transfer of TRUST property in 2000 had violated unambiguous terms of the TRUST contract. This request was formally argued in *Plaintiff's Rule 1-056 Motion for Summary Judgment that TRUST Terms were Violated by Property Removal* and this appeal seeks appellate review of trial court denial of that motion.

Establishing this meaning of the TRUST is fundamental to the claims in this Case in part because the past record of judicial review of the language of the TRUST has been one of avoidance. The district court should have been asked to review the language as a pre-requisite to real property transfers but it wasn't. Such a review should have been an integral part of the probate proceeding created by the death of Burr E. Lee, Jr. but it wasn't. In a subsequent "post-probate" proceeding against the hospice nurse who held title to TRUST property, the district court (Judge Carol Vigil) was asked to review the language of the TRUST, but she declined to do so, dismissing the case on a procedural matter without trial.

Now the district court (Judge Hall) has reviewed certain language of the TRUST and ruled it to be "ambiguous." In particular, Judge Hall has found that the following seventeen words, "the trustee shall continue to pay income and such sums of principal to the survivor as requested," can plausibly be interpreted to give the surviving co-settlor the unlimited power to invade the principal of the TRUST. Plaintiff-Appellant has objected to this ruling on two grounds:

(1) that such an interpretation ignores language in other parts of the TRUST, language appearing both before and after the seventeen words (the TRUST contract should be read in its entirety); and

(2) that no burden was placed on defendants to support or, for two defendants, to make their interpretation of this language, and that the defendants were allowed to create an "illusion" of plausibility (the burden of proof should rest with those seeking to prove contractual ambiguity).

Plaintiff-Appellant entered these objections into the trial court record prior to, during and after the entry of the ruling on February 8, 2007.

After this ruling and at considerable expense to Plaintiff, Mr. James F. Beckley, Esq. of Albuquerque was retained to provide an expert, authoritative legal opinion on the meaning of all parts of the TRUST language. In essence Mr. Beckley has determined (i) that the TRUST is a contract between the co-settlors Burr and Ruth Lee and three different successor trustees, Burr Lee (1992 - 2002), Plaintiff's sister (2002-2006) and Plaintiff (2006-present); (ii) that the language of the TRUST unambiguously prohibits the type of property transfers through which the hospice nurse acquired TRUST property; and (iii) that this prohibition has been binding on all three of the successor trustees after Ruth Lee's death in 1992.. Mr. Beckley also points out that "sums of principal" cannot refer to real property.

An affidavit with Mr. Beckley's authoritative legal opinion was used in April 2007 as the basis for a motion asking the trial court to reconsider its assessment of TRUST language as allowed under NMRA 1-060(B)(2). This motion, now fully briefed, is pending but no hearing date has been scheduled.

In its own review of the TRUST, options open to the Court of Appeals in considering this appeal include (a) making its own determination on the meaning of TRUST language and (b) returning the matter to the trial court with instructions to hear the pending motion for reconsideration.

Mindful of the inability of the previous trustee to obtain review of the TRUST language from the district court, Plaintiff-Appellant asks the Court of Appeals to affirm his right as present trustee to obtain precise instructions from the trial court on the legal meaning of the language of the TRUST (the trial court should provide precise instructions on TRUST language).

Statement of Issues

1. *The TRUST contract should be read in its entirety* - the trial court erred in determining that defendants interpretation of specific TRUST language (the seventeen words) was "plausible" because this interpretation was not reconciled with other language in the TRUST contract (the word "we," which appeared in an earlier paragraph in connection with unlimited power to request principal, was missing; and none of the conflicting real property restrictions placed on beneficiaries of the TRUST by a subsequent section was considered).

This issue was preserved by Plaintiff's oral objections which appear in the February 8, 2007 hearing transcript and by written objections appearing in the January 2, 2007 *Plaintiff's Motion for Re-Hearing* (denied), in the February 8, 2007 *Plaintiff Oral Argument in Brief* (distributed in the courtroom), and in the April 12, 2007 *Plaintiff's Motion to Reconsider* (now pending).

2. *The burden of proof should rest with those seeking to prove contractual ambiguity* - the trial court erred in allowing to stand without further support the scattered and incomplete argument from defendants regarding meaning of TRUST language they presented at the initial hearing on December 15, 2006 (no substantive argument on TRUST language has been forthcoming from the defendants since the December hearing and Judge Hall has incorrectly shouldered the burden for explaining the "plausibility" of defendants' interpretation).

This issue was preserved by Plaintiff's oral objections which appear in the February 8, 2007 hearing transcript and by written objections appearing in the February 2, 2007 *Plaintiff's Reply to Defendant's Response to Plaintiff's Motion for Re-Hearing* (denied), in the February 8, 2007 *Plaintiff Oral Argument in Brief* (distributed in the courtroom), and in the April 12, 2007 *Plaintiff's Motion to Reconsider* (now pending).

3. *The trial court should provide precise instructions on TRUST language* - the trial court in an underlying case in 2004 erred by not taking up consideration of the meaning of TRUST language at that time (fundamental rights of a trustee were denied with the result that the matter is up on appeal three years later).

As the trustee was not aware of this right in 2004, this issue is raised here for the first time to affirm trial court powers and responsibilities regarding trust enforcement in a probate proceeding.

List of Authorities

Supporting Authority:

Burr E. Lee, Jr. and Ruth C. Lee Self-Declaration of Trust No. 10331J (1979 TRUST contract)

General Rules of Contract Construction (interpreted as a whole, all provisions assumed to have significance, et al.)

Affidavit of James F. Beckley, Esq dated April 2, 2007 (authoritative interpretation of TRUST language)

NMSA §46A-2-201(C) Role of Court in administration of trust (trial court powers over trusts)

Contrary Authorities:

Affidavit of Fletcher R. Catron, Esq. dated July 1, 2004 (terms of TRUST were revocable)

Standard of Review:

All issues involve questions of law and may be reviewed "de novo."

Excerpt: from pleading entered on July 2, 2007
New Mexico Court of Appeals
Van Auken v. Catron et al. (2006)
Docketing Statement for Plaintiff's Appeal of Order Dismissing Claims of Trustee
By Plaintiff-Appellant Richard A. Van Auken, *pro se*
pp. AB-3, AB-4

Review of the Standing of the Trustee to Bring Suit

Claims brought by Plaintiff-Appellant as successor trustee of the TRUST were dismissed because they were brought and pursued *pro se*. The *Order Dismissing the Claims of the Trustee* originated in *Defendant Catron's Motion to Dismiss Claims of Trustee* which asserted that an entity other than a natural person must be represented by counsel and, in support, cited federal case law precluding non-lawyer trustees from bringing claims on behalf of a trust.

A trust, however, is not really an entity and the trustee personally holds legal title to trust property. The trustee then manages this personally owned property under the instructions in the trust instrument for the benefit of the trust beneficiaries. Accordingly, in most jurisdictions a non-lawyer trustee can bring suit in connection with personally owned trust property just as he or she can bring suit in connection with any other personal property.

The exception to this general rule seems to be in certain federal courts but even this exception only applies to non-lawyers who are also not beneficiaries of the trust.

Both the New Mexico Uniform Trust Code as well as the TRUST language itself confer upon the trustee the power to bring claims.

Additionally, the Plaintiff-Appellant is a beneficiary of the TRUST in addition to serving as the successor trustee.

Although the *Order* specified that the dismissal was without prejudice, statutory limitations of the maximum elapsed time allowed for filing the §45-1-106A claims precluded reassertion of the claims. So, in addition to this appeal Plaintiff entered a *Motion for Continuance* of the trustee's claims which, though fully briefed, has not been scheduled for hearing in the trial court.

Statement of Issues

1. The trustee of the TRUST should not be required to be represented by counsel - the trial court erred in dismissing the claims of the trustee based on limited federal court case law.

Excerpts: from pleading entered on January 30, 2008
New Mexico Court of Appeals
Van Auken v. Catron et al. (2006)
Memorandum in Opposition to the Proposed Summary Disposition
By Plaintiff-Appellant Richard A. Van Auken, *pro se*

A. Issue of Meaning of Trust Instrument: ¶5, p. AA-6

> That the TRUST was violated by this real property removal is central to the §45-1-106A claim of Probate Fraud. The violation is also at the center of the §36-2-17 claim of Attorney, Deceit and Collusion. The violation also colors all other matters, defenses and replies, motions and responses, presently open in this Case. [RP 266, p.3, ¶9.]

and

> . . .[these] motions and arguments . . seek to avoid such a determination of underlying TRUST violation . . The time has come to legally establish TRUST violation once and for all. The matter can no longer be avoided. [RP 266, p.3, ¶10]

B. Significance of Ambiguity Ruling: ¶9, p. AA-11

None of the above probate behavior by the four Defendants-Attorneys violates any law or rule or standard if the language of the TRUST does not apply (e.g. if the TRUST were easily revoked by the surviving co-settlor). However, if, as argued by Plaintiff-Appellant and by trust expert James F. Beckley, the TRUST contains unambiguous language of an irrevocable trust instrument [RP 565, p2, ¶14; p3, ¶18] which is directly connected to the condition of the estate of the surviving co-settlor, then the Defendants-Attorneys, each of them a licensed trust and estate professional, either knew - or should have known - how this fact colored their actions. Innocuous acts became acts and omissions which violated New Mexico Statute Law and Rules of Professional Conduct for attorneys.

C. Right to Final Construction of Trust: ¶10, p. AA-13

Where the Court cites Handmaker v. Henney [PSD Issues, ¶2, p3, lines 15-18] and Goldberg v. Uptown [Id p3, line 16 - p4 line 3] in stating that the denial Order "appears not to be a final appealable order," [Id p3, line 14] Plaintiff-Appellant argues that he has the right to an immediate determination that the TRUST Agreement is unambiguous, irrevocable and was violated by a property transfer and cites Carrillo v. Rostro, 114 N.M. 607, 845 P.2d 130, 31 N.M. St. B. Bull. 978 (N.M. 1002), ¶ 28, (stating that, "[The district court's] decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated . .")

D. District Court Actions: ¶11, p. AA-15

The record of review of TRUST language by both lawyers and the trial court in Santa Fe County has been one of "avoidance." [Ct. App. No. 27,554, page AA-4, lines 3-11; Docketing Statement]. In fact , the trial court failed to enforce its own Order, entered on April 12, 2004 in an underlying case . .

E. Deceitful Trust Interpretation: ¶12, p. AA-17

Simply, the central deceit was that the TRUST Agreement was revocable so TRUST property could be removed at will by the trustee. Specifically, language in Trust Section Five: Trust Amendment which states that:

> Upon the death of [one of the co-settlors] this trust may not be revoked or amended in regard to successor beneficiaries [RP 1, Exhibit A-6].

Was deceitfully interpreted to mean that:

> [the surviving co-settlor could] not revoke or amend the trust 'in regard to successor beneficiaries' . . [but could] amend and modify the

trust however [he wanted] except that the successor beneficiaries must not be altered [RP 401, Exhibit 1, page 1, ¶2]

F. Attorney Conflict of Interest: ¶13, p. AA-19

Subsequently learned and not included in the docketing statement . . . are violations which arise . . in the area of attorney ethics and behavior as described in [NMSA] §36-2-16, Breach of confidence, under which an attorney is in violation when "having informed himself of [a client's] cause and means of defense, shall desert him and defend the other) and in the Rules of Professional Conduct NMRA Rules 16-1-06 through 16-109 (conflict of interest).

G. Requirement for Legal Representation: ¶15, p. AA-21

Now the Court in its PSD points out that the claims of the beneficiary and the trustee are "inextricably interwoven" [PSD Issues, ¶3, p4, line 10] so claims of the beneficiary are at risk for lack of counsel as well. Plaintiff-Appellant concurs that the "beneficiary" and the "trustee" are closely linked as claimants in this Case but asks how the requirement for for professional legal representation arises? The third main argument raised in opposition to the PSD is that no legal basis for such a requirement for an in-family trust in New Mexico has yet been presented. According to Loring A Trustee's Handbook (2006) the trustee holds personal title to trust property and with rare exception does not require an attorney in personal litigation involving the property.

> Loring 8.36: The trustee has legal title to the trust property. [Loring §3.5.1] As the owner of the trust property, it is he who contracts with thrid parties, i.e. nonbeneficiaries, on behalf of the trust. [Loring §7.3.1] If he may represent himself in personal litigation withyout counsel, i.e. represent himself pro se, [U.S.C. §1654] one would think he also could handle litigation between the trust and third parties without counsel. Citing as indirect

authority the language of the Judiciary Act of 1789, now found in 28 U.S.C. §1654, one court, however, has ruled that a trustee who is neither a beneficiary or a lawyer may not represent the trust in federal court litigation. [C.E. Pope Equity Trust v. U.S., 818 F.2d 696 (9th Cir. 1987)]

H. Difficulty of Retaining Attorneys: ¶16, pp. AA-22, 3

Plaintiff-Appellant did not initially contest the trial court requirement to obtain counsel judging it to be a reasonable request. However, in contacting trust and estate attorneys throughout New Mexico it was soon discovered that no one really wanted to go up against the Defendants-Attorneys in this Case. The varied nature of this resistance was detailed in a reply pleading in early February 2007 [RP 425] and a list of thirty-two attorney/firm contacts who had declined as of March 5, 2007 was attached to Plaintiff's Motion for Continuance of Claims of Trustee, a motion which is still pending. [RP 480]. When James F. Beckley subsequently agreed to enter the Case as an expert witness for William Gilstrap and Daymon Ely, even he expressed extreme reservations because of the defendants. Mr. Beckley put these reservations in an affidavit which was filed ion support of the Motion for Continuance. [RP 615 - "distasteful nature of claims against colleagues"]. Pursuant to instructions from this Court, the trial court in September 2007 reviewed the withdrawal motion of Messrs. Gilstrap and Ely. More difficulty arose at the hearing after they agreed to continue their representation for [the Plaintiff-Appellant's claims against] all defendants but Defendant-Appellee Wirth. When the court instructed that they had to take on all defendants or none, they were allowed to withdraw completely. Plaintiff-Appellant has come to see the request to retain counsel in the case as an unreasonable request which, because it relates to the dismissal of valid claims, unfairly helps the Defendants-Attorneys who are members of the same small Bar.

Excerpts: from pleading entered on May 8, 2008
New Mexico Court of Appeals
Van Auken v. Catron et al. (2006)
Memorandum in Opposition to the Second Proposed Summary Disposition
By Plaintiff-Appellant Richard A. Van Auken, *pro se*

A. Opportunity to settle trustee standing: ¶4, p. AB-3

As a result of much research, many pleadings and considerable trial court expense, Plaintiff-Appellant suggests that a record has been created which shows that the question of whether a common law trust requires a licensed attorney to properly appear in a New Mexico courtroom is not settled in law or practice. Even the trial court at the initial December 2006 hearing in this Case showed considerable latitude on this question by allowing Plaintiff-Appellant to continue on for a time as trustee in spite of nearly six months of previous *pro se* activity in his court. Given the growing popularity of common law family trusts where the trustee is frequently a non-licensed family member, it would make sense for the Court to resolve this issue in this Case. In a manner similar to how, in 2001, *Martinez v. Roscoe* set the representation required for an LLC, the Court could use this Case to set representation requirements for common law family trusts in New Mexico practice.

B. Legal character of trusts: Pages AB-6 thru AB-10

(Section Title) Common Law Family Trusts are Not Artificial Legal Entities (¶6, pp. AB-6 through AB-8)

(Section Title) *Martinez v. Roscoe* Does Not Apply to Family Trusts (¶7, pp.. AB-8 through AB-10)

C. *Pro se* trustee citations: ¶8, pp. AB-10,AB-11

Cursory review of published appellate case law turns up a wide variety of cases where trustees *pro se* have appeared with full standing in front of the court. Recent cases include four from North Carolina in 2006,

Tennessee in 1978, Massachusetts in 1977 and New York in 2007: *In re Foreclosure of Deed of Trust Executed by Hunt to James T. Lee, Trustee By: Robert L. Lindsey, Jr. Substitute Trustee* **[trustee *pro se*]**, 626 S.E.2d 875, 176 N.C.App. 407; 03/07/2006 (*pro se* trustee-appellee as trustee of deed of trust); *Laurence B. Howard Jr v. United States and William F. Howard, Trustee* **[trustee *pro se*]**; 04/24/1978 (trustee *pro se* as one of two trustee of a residuary trust created by Laurence B. Howard Sr. for his two sons); *Phillip J. Nexxon* **[trustee *pro se*]** *v. Boston Safe Deposit*; 07/08/1977 (plaintiff-trustee *pro se* as surviving trustee of a testamentary trust); and *In re Arbitration Between Esther Ismaailoff, Efie Golan, Doron Ismailoff, Ayal Kalil And Varda Banilivy* **[all trustees *pro se*]**, 342207 N.Y.Sur.;02/01/2007 (four children as trustees *pro se* of an irrevocable inter vivos trust created for them by their mother).

It is reasonable that a binding family trust which can be easily created by one or more family members with paper and pen at a kitchen table and which never needs to be recorded in any public place need not rely on licensed attorneys to resolve disputes - large or small - which may arise over the generational lifetime of the trust agreement. Such trusts can be, and often are, held in secret by the family trustee(s).

D. ***Pro se* defense as an unfair "class action:" ¶¶ 11, 12,13, pp. AB-14 through AB-17**

11. *Pro Se* Defense Being Used to Protect Attorneys: A second area of argument in opposition to PSD #2 relates to how the requirement for the trustee to obtain legal representation from licensed New Mexico attorneys is being used as a primary defense in a proceeding involving claims against licensed New Mexico attorneys. Two separate pleadings by Defendant-Appellee Catron in the record of this Case cite good reasons why licensed attorneys are required in some cases. "[W]hen a licensed

attorney represents a party, there are grounds to believe that the representative's character, knowledge and training are equal to the responsibility." [RP 67] "Plaintiff ignores the body of law requiring licensed attorneys to represent entities other than individuals, both for the protection of the parties and for the efficient operation of the justice systems." [RP 526, p1, lines 10-12]

Entirely apart from the argument made in the paragraphs of Area VI above that a trust is not an entity separate from the trustee, there is the second argument in opposition to PSD #2 that Defendants-Attorneys turn all the fine words about character, knowledge, responsibility, protection of parties and judicial efficiency upside down. Their meaning no longer applies in this Case because the claims relate to how the Defendant-Appellees, all licensed NM attorneys, violated their responsibilities, used their knowledge against a previous client-trustee, and obstructed the judicial process all to the detriment of the trustee and the interests of the beneficiaries which had been placed in a trust whose terms they well knew. And worse, because of the relatively small trust and estate bar in New Mexico, licensed attorneys qualified to enter the Case were generally dissuaded from opposing their well-positioned colleagues in serious litigation. One of the Defendant-Appellees in this Case quit the underlying probate proceeding under pressure and a second team of attorneys, engaged briefly last year, declined to continue, were allowed to withdraw and, though pressed, still haven't explained their legal reasons for doing so.

Interposing the defense that Plaintiff-Appellant can't properly proceed with his claims without licensed representation amounts to an unfair "class action" defense. Non-Attorneys can't sue licensed attorneys in trust matters without very-difficult-to-obtain

representation by other qualified licensed attorneys from the same small bar.

12. Claims Dismissal Violates Equal Justice Principle: The difficulty of due process in this Case and above "class" effect in use in defense of the claims raised, directs attention to the "equal justice" guarantees afforded everyone in the United States. Using the lack of licensed counsel as a primary defense to dismiss, obstructs the due process of law and denies non-licensed trustees of family trusts equal protection under New Mexico law.

13. Case Demonstrates Unregulated Attorney Powers: The thrust of this second argument in opposition to PSD #2 leads logically to the question of how to fix a situation which is quite apparently broken or not working. In a citation from Srader v. Verant [PSD #2, ¶4, lines 6-8] "equity and good conscience" are invoked by the PSD #2 in certain instructions to the trial court. Plaintiff-Appellant asks that "equity and good conscience" be invoked to determine why licensed New Mexico attorneys - the Defendant-Attorneys - ought to be allowed to collectively misrepresent and/or ignore the clear language of a valid family trust in a probate proceeding where an untrained non-lawyer family trustee, struggling to understand why valuable trust property is missing, is denied proper knowledge and legal advice in deference to conflicted representation of the actual holder of the former trust property. Who is supposed to be responsible for "equity and good conscience" at such times and how, in "equity and good conscience" are those actually involved supposed to be held to account? Can the New Mexico legal community hold its own accountable? In "equity and good conscience" can New Mexico attorneys be trusted to enforce family trusts during generational family change? Or do outside agencies need to step in?

Excerpts: from pleading entered on June 19, 2007
First Judicial District Court
Lee v. Catron et al. (2007) [Record Proper 22]
Response to Attorneys' Motion to Withdraw
By Plaintiff Richard A. Van Auken, *pro se,* pp. 1 - 3

3. Plaintiff is not aware of any differences, irreconcilable or otherwise, regarding the management of this case although Plaintiff may not be fully informed.

4. Since December 2006 Plaintiff has spent considerable time and has gone to considerable expense in arranging representation in this matter by Messrs. Ely and Gilstrap along with supporting testimony from trust and estate authority James F. Beckley, Esq. .

6. Plaintiff . . . was unaware that a new *Complaint* had been served and filed - thus creating this *new* Case - until four days ago as the case number was being entered into the caption of the initial version of this *Response*.

12. Mr. Beckley, as the trust and estate expert upon whom Messrs. Ely and Gilstrap are relying for authoritative opinion on TRUST language, has said, in the sworn statements of his affidavit, that the language is "unambiguous" and that irrevocable terms were violated by removal of trust property.

13. In connection with the preparation of the affidavit containing these statements, Mr. Beckley has directly advised Plaintiff that a judicial determination that TRUST language is unambiguous is a "big deal" and that Plaintiff is not "splitting hairs" in continuing to seek such a determination as originally set forth nearly a year ago by the *Complaint* in the other case (D-0101-CV-2006-01509).

15. Aside from the significance to the claims in this Case or to the claims in the other case, Plaintiff's position is that the language of the TRUST instrument has been "disrespected" by the legal community in Santa Fe where, since 1999, (i) legal advice was given to a successor trustee

that the TRUST was revocable so that a revised TRUST instrument was created for him, (ii) legal advice was given to another successor trustee that TRUST language "apparently" permitted removal TRUST property so that she was left to fend for herself in enforcing the TRUST during a probate case, (iii) a new legal advisor abruptly quit in the middle of the probate case rather than deal with earlier bad advice, and (iv) no advice was given to either successor trustee that the First Judicial District Court could (or should) interpret and enforce the TRUST language prior to or during the probate case (D-0101-PB-2002-00165) for Burr Lee's estate.

16. This abuse of the TRUST by the legal community in Santa Fe continued when Judge Carol Vigil of the First Judicial District Court was formally asked in 2004 in a post-probate case (D-0101-CV-2003001861) to interpret and enforce the TRUST language at which time (i) a Court *Order* which prevented the successor trustee from using expert testimony of Mr. Beckley was violated by one Santa Fe attorney in introducing false and misleading expert testimony of another Santa Fe attorney and (ii) Judge Vigil avoided any determination of the meaning of TRUST language by dismissing that case on a technicality.

18. Plaintiff's understanding of and belief in the language written and agreed to his mother in 1979 led to the filing of the other case (D-0101-CV-2006-01509) in July 2006 with an initial primary mission being to establish the clear legal meaning of this language of the TRUST which has contractually bound each successor trustee.

20. Full review of TRUST language . . . in light of Mr. Beckley's recent affidavit is now pending [in this Court] and should be allowed to be completed before consideration of this *Motion to Withdraw* for it is only after such review is completed that the omissions, comissions and failures to meet professional standards by members of the Santa Fe legal community can be properly assessed.

Excerpt: from pleading entered on October 11, 2007
First Judicial District Court
Lee v. Catron et al. (2007) [Record Proper 54]
Plaintiff's Motion to Establish Legal Representation for Trustee
By Plaintiff Richard A. Van Auken, *pro se*
pp. 2 - 3

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12. Mindful of all the above actions and findings in this Case and the related case, Plaintiff respectfully requests the Court to establish legal representation for the Plaintiff as trustee of the TRUST in this Case in at least one of the following ways:

a. by directly ruling that the Plaintiff, as trustee of the TRUST in this Case, may properly represent the interests of the TRUST since the assets of the TRUST (including this lawsuit and the related case) are his own personal property which, as trustee he is holding and managing in the best interests of the TRUST;

b. by hearing Plaintiff's pending *Motion for Continuance* in the related Case using the outcome as a basis for establishing representation in this Case;

c. by allowing Plaintiff time to obtain the Case papers from the Court Clerk and, thereafter, to retain counsel, or

d. by allowing the Court of Appeals to rule on the Plaintiff's appeal of the February 8, 2007 *Order Dismissing Claims of Trustee* and using its ruling as the basis for establishing legal representation in this Case.

Excerpt: from pleading entered on November 1, 2007
First Judicial District Court
Lee v. Catron et al. (2007) [Record Proper 58]
Defendant Karen Aubrey's Response to Plaintiff's Motion to Establish Legal Representation for Trustee
By Jennifer Rozzoni for Karen Aubrey; pp. 2 - 3

I. Plaintiff Cannot Represent the Trust in a *Pro Se* Capacity

Plaintiff first suggests that this Court affirmatively rule that Plaintiff may represent the Trust as Trustee and in a pro se capacity. However, it is clear that Plaintiff cannot represent the subject Trust as a non-attorney. In New Mexico, there are only two types of legal representation, that of litigants appearing pro se and that of litigants appearing through counsel. *See In the Matter of Schmidt*, 1997-NMSC-008 at ¶13, 122 N.M. 770. Further, New Mexico requires that an entity, other than a natural person, must be represented by counsel. For instance, a limited liability company must be represented by counsel. *See Martinez v. Roscoe*, 2001-NMCA-083, 131 N.M. 137. Similarly, a corporation must also be represented by counsel. *See State ex rel. Norvell v. Credit Bureau of Albuquerque*, 85 N.M. 521, 514 P.2d 40 (1973).

Although New Mexico has not yet addressed whether a trust requires representation of counsel, Federal Courts have decided that such representation is indeed necessary. *See United States v. Henkel*, 79 A.F.T.R.2d (RIA) 2126 (E.D. Calif.1997); *Pacific Property Management v. Delta Investment*, 74 A.F.T.R.2d (RIA) 5654(E.D. Calif. 1994). Given New Mexico's stance regarding limited liability companies and corporations, it is only logical that New Mexico would further require that a trust entity be represented by counsel as well. As such, Plaintiff's request that this Court rule that the Plaintiff as trustee be allowed to represent the Trust, pro se, is without merit or support and should be denied.

Excerpts: from pleading entered on November 16, 2007
First Judicial District Court
Lee v. Catron et al. (2007) [Record Proper 68]
Plaintiff's Reply to Defendant Aubrey's Response to Plaintiff's Motion to Establish Legal Representation for Trustee
By Richard A. Van Auken, *pro se*
pp. 2 and 4

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4. The first way of establishing legal representation for the trustee, allowing *pro se* representation of TRUST interests by the Plaintiff as trustee, has already been extensively argued in many different parts of the related 2006 case (*Van Auken v. Catron et al.*) and is part of the appeal in that case. Defendant Aubrey's argument that "New Mexico requires that an entity, other than a natural person must be represented by counsel," does not apply since the TRUST is not a separate legal entity but just a legal (i.e. fiduciary) responsibility attached to property personally owned by the trustee for the interest of TRUST beneficiaries. . . In particular NMSA Section 46A-3-303D provides that "a trustee may represent and bind the beneficiaries of the trust." Accordingly, the Court can establish pro se legal representation for the trustee in this Case.

13. The revocability of the TRUST is just one of the misrepresentations of TRUST language which Defendant Aubrey and other defendant attorneys created, maintained and/or allowed during the Probate Case and beyond.

14. Called to account for their collective handling of the TRUST language, Defendant Catron, Defendant Aubrey and others have sought to bamboozle the Plaintiff and the Court into believing that the TRUST is an entity and that this entity requires professional legal representation.

Excerpts: from pleading entered on November 20, 2007
First Judicial District Court
Lee v. Catron et al. (2007) [Record Proper 73]
Defendant Catron's Motion to Dismiss
By Jack Brant for Catron defendants
pp. 1 and 2

The only plaintiff in this case is the Bur. E. Lee, Jr. and Ruth C. Lee Self-Declaration of Trust No. 10331J.

In New Mexico, only two types of legal representation are recognized: litigants appearing *pro se* or those appearing through counsel of record. *In the Matter of Schmidt*, 1997-NMSC-008 at ¶ 13, 122 N.M. 770, 931 P.2d 1386 (1997) One reason for this rule is that when a licensed attorney represents a party, there are grounds to believe that the representative's character, knowledge and training are equal to the responsibility. *Id.* Applying this general rule more specifically, we see that an entity other than a natural person must be represented by counsel. For instance, a limited liability company must be represented by counsel. *Martinez v. Roscoe*, 2001-NMCA-083, 131 N.M. 137, 33 P.3d 887, and a corporation must be represented by counsel. *State ex rel. Norvell v. Credit Bureau of Albuquerque*, 85 N.M. 521, 514 P.2d 40 (1973).

While New Mexico courts have not addressed whether a trust must be represented by counsel, federal courts have, deciding that a trust may not be represented by a non-attorney but must have counsel to appear in an action. See *United States v. Henkel*, 1997 U.S. Dist LEXIS 4917; 79 A.F.T.R.2d (RIA) 2126 (E.D. Calif.1997); *Pacific Property Management v. Delta Investment*, 1994 U.S. Dist LEXIS 10593; 74 A.F.T.R.2d (RIA) 5654(E.D. Calif. 1994). The current trustee of the plaintiff Trust, Mr. Van Auken, cannot represent the Trust *pro se*. As Trustee, he and the Trust must be represented by counsel.

Excerpt: from pleading entered on December 5, 2007
First Judicial District Court
Lee v. Catron et al. (2007) [Record Proper 83]
Plaintiff's Response to the Catron Defendants' Motion to Dismiss
By: Richard A. Van Auken, pro se
pp. 2, 3

Misleading Argument About the Caption in this Case

8. The Catron defendants assert that the "only plaintiff in this case is the "Burr E. Lee, Jr. and Ruth C. Lee Self-Declaration of Trust No. 10331J" (TRUST) thereby presenting the caption in the Complaint without the appended "by and through Richard A. Van Auken, Trustee."

9. Both the Complaint and a pending motion by Plaintiff in this Case request that Court make a "proper" determination of this caption.

10. The Catron Defendants assertion that the "only plaintiff" in this Case is the TRUST cannot be correct since the TRUST is not a legal entity with standing before the Court.

11. The Catron Defendants' assertion that the "only plaintiff" in this Case is misleading because the words "by and through Richard A. Van Auken, Trustee" are also part of the caption for Plaintiff. The Plaintiff with the proper standing to sue is, in fact, the Trustee of the TRUST, i.e. Richard A. Van Auken.

12. Plaintiff argues that a caption which shows "TRUST by and through the Trustee, Richard A. Van Auken, Trustee" and a caption which shows "Richard A. Van Auken as Trustee of the TRUST" are properly taken to be identical in effect because each caption names a natural person with standing to sue. In each caption this natural person, Richard A. Van Auken, properly appears in his capacity as owner or holder of property rights conveyed to him as Trustee under the terms of the TRUST which he holds and manages in the interest of the TRUST beneficiaries.

Excerpt: from pleading entered on January 16, 2008
First Judicial District Court
Lee v. Catron et al. (2007) [Record Proper 95]
Defendant Karen Aubrey's Motion to Dismiss
By: Jennifer Rozzoni for Karen Aubrey
pp. 8, 9

IV. The Plaintiff Trust Cannot Be Represented in a Pro Se Capacity and its Claim Must be Dismissed.

The Plaintiff in this case is the Burr E. Lee, Jr. and Ruth C. Lee Self-Declaration of Trust. . . .

In New Mexico, there are only two types of legal representation, that of litigants appearing pro se and that of litigants appearing through counsel. *See In the Matter of Schmidt,* 1997-NMSC-008 at ¶13, 122 N.M. 770. Further, New Mexico requires that an entity, other than a natural person, must be represented by counsel. For instance, the New Mexico Court of Appeals has held that a limited liability company must be represented by counsel. *See Martinez v. Roscoe,* 2001-NMCA-083, 131 N.M. 137. Similarly, a corporation must also be represented by counsel. *See State ex rel. Norvell v. Credit Bureau of Albuquerque,* 85 N.M. 521, 514 P.2d 40 (1973).

Although New Mexico has not yet addressed whether a trust requires representation of counsel, Federal Courts have decided that such representation is indeed necessary. *See United States v. Henkel,* 79 A.F.T.R.2d (RIA) 2126 (E.D. Calif.1997); *Pacific Property Management v. Delta Investment,* 74 A.F.T.R.2d (RIA) 5654(E.D. Calif. 1994). Given New Mexico's stance regarding limited liability companies and corporations, it is only logical that New Mexico would further require that a trust entity be represented by counsel as well.

Excerpts: from pleading entered on February 19, 2008
First Judicial District Court
Lee v. Catron et al. (2007) [Record Proper 123]
Plaintiff's Supplemental Brief in Support of Plaintiff's Response to the Catron Defendants' Motion to Dismiss
By: Richard A. Van Auken, *pro se*
pp. 1, 2, Attachment Y-1

3. Attached as Exhibit Y-1 hereto is an excerpt from a red-line draft of the Uniform Statutory Trust Entity Act now being prepared by the National Conference of Commissioners on Uniform State Laws. The excerpt clearly notes two different kinds of operating trusts: "common law" trusts including in-family trusts and the new "statutory trust" which is to be used with business trusts.

4. Plaintiff has maintained that an in-family "common law" trust like the TRUST in this Case is not an entity and that, as trustee, the assets of the TRUST are his own personal property and do not require an attorney in court proceedings.

5. Plaintiff's position is supported [by] *Loring A Trustees Handbook* (2006) which says that the trustee holds personal title to trust property and with rare exceptions does not require an attorney in personal litigation involving the property:

> Loring 8.36: The trustee has legal title to the trust property. [Loring §3.5.1] As the owner of the trust property, it is he who contracts with third parties, i.e. nonbeneficiaries, on behalf of the trust. [Loring §7.3.1] If he may represent himself in personal litigation without counsel, i.e. represent himself pro se, [28 U.S.C. §1654] one would think he also could handle litigation between the trust and third parties without counsel. Citing as indirect authority the language of the Judiciary Act of 1789, now found in

U.S.C. §1654, one court, however, has ruled that a trustee who is neither a beneficiary or a lawyer may not represent the trust in federal court litigation. [C.E. Pope Equity Trust v. U.S., 818 F2.d 696 (9th Cir. 1987].

The exceptions, it turns out, are those trusts which are among those covered by the new Uniform Statutory Trust Entity Act. These "entity" trusts would clearly require professional representation.

6. Attached as Exhibit Y-2 hereto is a listing of different types of appellate cases in other states for which a trustee with *pro se* standing was allowed by the court.

Attachment

Exhibit Y-1: Two Types of Trusts

DRAFT: FOR DISCUSSION ONLY

UNIFORM STATUTORY TRUST ENTITY ACT

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

From Prefatory Note

"Because a common law trust is not a juridical entity, it must sue, be sued, and transact over property in the name of the trustee in the trustee's capacity as such."

"In contrast . . a statutory trust is a juridical entity, separate from its trustees and beneficial owners, that has a capacity to sue, be sued, and transact over property in its own name."

Excerpt: from pleading entered on June 16, 2008
New Mexico Court of Appeals
Lee v. Catron et al. (2007)
Docketing Statement for Appeal of Order of Dismissal Without Prejudice
By: Richard A. Van Auken, *pro se*
pp. 6 - 11

The Novel Class Action Defense

All of the various Santa Fe attorneys implicated in this Case had access to the language of the six-page TRUST Agreement months and even years before Plaintiff-Appellant first read the document (as a beneficiary) in 2003. And there is no question that the defendant firms and attorneys are vastly more educated on New Mexico and trust law in general.

However, the language of the TRUST Agreement is clear and from the outset, in late 2003, Plaintiff-Appellant sought judicial review and subsequent enforcement of the apparently-violated language. When this review was frustrated in the second case brought by his sister as trustee, Plaintiff-Appellant took on the position of trustee *for the sole purpose of getting a proper judicial review of the language in the 1979 TRUST.* The third case above, a case requesting such review was filed in July 2006.

Now after scores of filings and substantial legal fees and other direct expense, the required judicial review seems no closer than it was two years ago. The reason? The various Santa Fe attorneys implicated by this action have managed to fashion a primary defense which asserts that Plaintiff-Appellant has no standing to sue them, licensed New Mexico attorneys, unless represented by one of their group, another licensed New Mexico attorney. This so-called "class-action defense" is now the primary issue in this Case, in all four cases stretching back to 2002 and in this appeal.

Plaintiff-Appellant has no objection to using or compensating licensed New Mexico attorneys in this Case. However, dismissal of valid claims against prominent attorneys on the basis that other attorneys won't join (or stay on) the Case is unfair in the extreme.

Review of Judicial Standing of *Pro Se* Trustee of Express Trust

This Case involves serious claims against members of the legal profession in New Mexico and the law firm and lawyers involved have every right to mount an effective defense. However, when the defendant attorneys ignore the substance of the claims and select as their primary defense that the *pro se* plaintiff has no standing to sue, the larger question is whether the legal community can be held accountable by others for its failure to perform as required.

When a law firm and lawyers involved with estates and trusts use such defenses against a non-lawyer family trustee of a common law family trust they are accused of judicially obstructing, they actually may be proving the claims through further obstruction.

The review in this appeal of the judicial standing of a *pro se* trustee of a common law, express trust, the TRUST, gets at the larger question of attorney accountability for trust and probate behavior and, thereby, whether the very large number of families who place valuable property in inter-generational trusts, should trust the lawyers with their trusts.

The defense of the lawyers to this point has involved four parts, each of which affects this review: characterizing trusts as artificial entities, getting initial district court acceptance that licensed representation would be a good idea, discouraging colleagues in the bar from entering the Case in opposition, and relying on the trial court for dismissal of claims in the event that no licensed attorney appears in support of plaintiff's claims.

Characterizing Trusts as Artificial Entities

The idea that the TRUST in this Case is an artificial entity first appeared in a motion for dismissal of the claims of the trustee in a related case. The motion in that case by Fletcher Catron used federal case law involving business trusts to argue that the *pro se* trustee of the TRUST had no standing to sue. In this Case, Defendant-Appellee Aubrey cited similar federal case law for the same purpose. In spite of extensive argument to the contrary, the trial court judge appears to have incorrectly accepted the idea that the TRUST is somehow an artificial entity. In this regard, the lawyers engaged by Plaintiff-Appellant did not help matters by filing this Case in part on behalf of the TRUST, "by and through itself." The first matter for review is this assertion that a common law family trust, an express trust, is a separate legal entity.

Getting Licensed Representation is Good for the Trustee

The idea that the interests of the trustee of the TRUST in this Case would benefit from good legal advice has never been questioned. Prudent trustees would ordinarily retain counsel in recovering property lost from a trust. However, the opportunity to benefit from good representation and the ability to acquire such representation are two different things. The trustee has spent considerable amounts of money on legal fees over many years so lack of resource application is not the problem. The issue requiring review is whether the inability to be able to find an attorney willing to enter this Case is ground for dismissal of claims. The trial court has overstepped the bounds of normal judicial practice by dismissing Plaintiff-Appellant's claims for lack of counsel.

Disinclination of Licensed Attorneys to Oppose Colleagues

A very large number of lawyers in New Mexico are on record as wanting nothing to do with this Case, so many that pressure from the Defendant-Appellees and their immediate associates is a likely factor. One of the Defendant-Appellees is named in this Case because, in the

underlying probate case in 2003, she abruptly withdrew without adequate notice or explanation, as if under pressure. Likewise, the attorneys who filed this Case in May 2007, having moved to withdraw just weeks later in June 2007, appear to be under considerable pressure from some quarters. These attorneys have yet to adequately explain why they withdrew or, for that matter, why they filed this Case the way they did. Although quite sensitive to this issue, the trial court nevertheless erred in dismissing all claims for lack of counsel.

Defendant-Appellee Exclusive Reliance on Earlier Trial Court Ruling

One authority alone cited by Defendant-Appelles Catron was used to justify the dismissal of all claims in this Case: the earlier decision of the trial court to dismiss the claims of a *pro se* trustee in a related case. Based on nothing more than a complicated, thrice-delayed decision in an earlier case, the dismissals in this Case were primarily driven by the need for district court consistency. Judge Hall made specific mention of this fact at a hearing on February 21, 2008. Since the earlier decision was already under review by this Court (in Ct. Ap. No. 27,554), Judge Hall noted that he would accept instruction from the higher court in this matter. As it stands now the trial court has issued a ruling in this Case which is inconsistent with other probate law and which unfairly elevates the interests of New Mexico lawyers above the interests of TRUST beneficiaries being advocated by the *pro se* trustee.

Each of the above four areas warrant review in this appeal and the process for doing so would seem to be similar to that which this Court apparently used in arriving at the New Mexico ruling which requires limited liability [companies] to appear in court through counsel (*Martinez v. Roscoe*, NMCA 2001)

Statement of Issues

1. *Common Law Family Trusts are Not Recognized as Separate Legal Entities*: The trial court erred in treating the TRUST in this Case as a separate legal entity

2. *No Regulation, Statute, or Case Law Preempts the Right of an Individual to Represent His Interests in Court - Even His Interests as a Fiduciary*: The trial court failed to recognize basic rights of the trustee in this Case.

3. *Trustees Commonly Participate in Judicial Proceedings without Counsel*: The trial court ignored a wide variety of legal and administrative disputes where family trustees appear *pro se*.

4. *New Mexico Case Law Such as Martinez v. Roscoe for Limited Liability [Companies] Does Not Apply*: The trial court incorrectly extended established New Mexico case law for limited liability [companies] to trusts.

5. *Common Probate Practice Has No Bar to Pro Se Appearances by Similar Fiduciaries*: The trial court failed to use the same standard of acceptable legal representation for a family trustee of the TRUST in this Case as would be required for a personal representative of an estate.

6. *Allowing Lawyers to Interpose The Pro Se Appearance of the Trustee as a Primary Defense Against Claims of Their Own Wrong-Doing Puts the Interests of Lawyers, As a Class, Above Those of Trust Beneficiaries*: The trial court failed to properly balance the interests of two different classes of persons unfairly favoring those of licensed attorneys over those of the beneficiaries of a trust.

Excerpts: from pleading entered on August 15, 2008
New Mexico Court of Appeals
Lee v. Catron et al. (2007)
Memorandum in Opposition to the Proposed Summary Disposition of July 23, 2008
By: Richard A. Van Auken, *pro se*

A. Citing Attorneys for Acts Since 1999: ¶6, p. AB-6

The appeal in this Case is made to thwart and overturn the primary defense raised by the defendant-attorneys which says, in effect, that the centuries-old institution of the common law trust as "settlor-trustee-beneficiary" has somehow, and seemingly because of their need for a defense, morphed into "settlor-trustee-attorney-beneficiary." Plaintiff-Appellant argues that there is no basis in equity or in law for such a transformation and that a judicial requirement to include the "attorney" is both unfair and unjustified - especially as a defense for attorneys accused of trust violations and obstruction.

B. Trustee Rights Blocked by "Class" Defense: ¶8, p. AB-9

The essence of this appeal is that a defense blocking the judicial standing of a *pro se* trustee has preempted Plaintiff-Appellant's right as trustee to know with certainty the meaning of the TRUST instructions he is obliged to follow and enforce. In effect, claims against attorneys cannot be addressed until other attorneys help the trustee determine the meaning of the instructions in a common law trust and, since other attorneys have thus far been unwilling to do this, the claims of the trustee will simply not be heard in New Mexico courts. This results in attorneys, as a class, having a huge advantage in head-to-head litigation against family-member trustees of common law family trusts.

Plaintiff-Appellant argues below that this advantage is not lawful or equitable and that, *at a minimum*, Plaintiff-Appellant should be able to determine the meaning of TRUST instructions without being blocked by a "class"

defense fashioned by attorneys who themselves should have acted to formally determine such meaning long ago.

C. Title to Trust Property: ¶9, p. AB-11

From *Loring A Trustee's Handbook*, 2006 Edition, in describing a trust:

> "Title division and asset segregation are what give the trust its utility" [p.10]
>
> "Legal title to trust property is not in the beneficiary" [p.11]
>
> "[B]ecause trust property is segregated from the trustee's own assets, the trust property is not subject to the claims of the trustee's personal creditors." [p.11]

D. Origins of Trust Relationships: ¶11, p. AB-16, AB-17

Loring traces the use of early trusts to the Romans (300 A.D.), to the Germans (500 A.D.), to Islam (800 A.D.) and, ultimately, to England (1068 A.D.) from which, nearly a thousand years later, the use of trusts in New Mexico has directly developed. Islam and England shared the simple trust structure of settlor, trustee and beneficiary. [Loring: §8.37, pp. 688-693]

> A trustee holds title to property for someone's benefit. That is the essence of the trust, whose development from century to century is . . the greatest achievement of English jurisprudence and the largest and most important of equity's exploits.

Loring distinguishes legal rights from equitable interests and courts of law from courts of equity. "Whereas a judgment at law declares a plaintiff's rights, a decree in equity imposes duties on the defendant" [Id: p.2]

> The first steps towards establishing equitable interests [in England was] when a knight heading for the crusades would give property to a third party for the benefit of the knight's spouse and children whilst he was away [Id p.18]

E. Duty to Trust Instructions: ¶11, p. AB-18, AB-19

Loring describes two aspects of the instructions given to the trustee by the settlors: the preeminence of the instructions and the burden carried by the trustee to be totally loyal to those instructions.

> The fountainhead of the trustees's powers is the trust instrument. The settlor has the right to include in the trust instrument any provision relating to the management of the property or to the duties and powers of the trustee, provided it is not contrary to public policy or in derogation of the concept of the trust. These provisions, unless varied by the court, are binding upon the trustee and will supersede [statute] law applicable to the trustee. Accordingly, the trustee has no authority to enter into a contract that would have the effect of altering the terms of the trust, absent the consent of *all* the beneficiaries (and perhaps the settlor) or a court order. [Id p.24]

and

> Thus in the words of Mr. Loring: 'THE FIRST AND MOST IMPORTANT DUTY OF THE TRUSTEE IS TO STUDY AND BECOME THOROUGHLY FAMILIAR WITH THE PROVISIONS OF THE TRUST INSTRUMENT, AND THEREAFTER TO FOLLOW THEM OUT IMPLICITLY. (capitalization in original text)

F. Interests of Trust and Trustee: ¶13, p. AB-23

13. The Trustee's Right to Appear in Court *Pro Se* is a Personal Right: The *Calendar Notice* notes Plaintiff-Appellant's right to appear in Court *pro se* on behalf of "himself and his interests . ." [PSD: p.3, ¶2, line 2] But it continues "he cannot represent the interests of the Trust." [Id. line 3]

The Court's logic here is not correct. The "interests of the Trust" are included among the interests of "himself and his interests." [DS: Issue #2]

The implication here might be that there are some other interests, not those of the Plaintiff-Appellant as trustee, which are somehow operating in this Case. Whose interests would those be? The beneficiaries? The settlors?

G. Interests of Beneficiaries: ¶13, p. AB-23

The beneficiaries (of the TRUST) have no title to, power over or duty to the "property" at stake and no one has suggested that they are the real parties in this Case. The Calendar Notice cites *Chisholm v. Reuckhaus* (1997) in which a parent brings suit on behalf of a child. In *Chisholm* the child is the real party, not the parent. As clearly set forth in argument above, in this Case *the trustee is the real party*. So *Chisholm* cannot apply here. Rule SCRA 1-017A clarifies this "Real Party in Interest" issue as follows: "Every action shall be prosecuted in the name of the real party in interest; but [a] . . . trustee of an express trust . . . may sue in that person's own name without joining the party for whose benefit the action is brought." [Ct. App. 27,554: RP 679, p.5, ¶3]

H. Interests of Settlors: ¶13, p. AB-24

The interest of the settlors is a little closer to the mark since it is their instructions which the trustee has personally agreed to understand, loyally follow and enforce.

However, both of the settlors, having passed away, are no longer able to be parties in this Case or be represented for that matter. That leaves the trustee as the only active party and, in fact, it was these two settlors' intent in creating the TRUST in 1979 to allow this exact situation. As the only juridical party to this Case, the trustee is loyally following the instructions of the settlors. The relationship between settlors and trust is very similar to

that between the maker of a will and a personal representative of the estate.

I. *Steele v. Mcdonald* (2006 - TX): ¶13, p. AB-24

This leads to Texas case law, *Steele v. McDonald* (2006), cited in the *Calendar Notice,* where a personal representative was required by a court to retain counsel "because the personal representative was litigating rights in a representative capacity rather than on his own behalf." [PSD: p.3, ¶2, lines 4-8] The *Steele* case involved many parties and valuable mineral rights and, when a attorney quit, a personal representative filed a *pro se* pleading which was rejected by the court. The court wanted a replacement attorney and it got one. Faced with serious court obstacles, the personal representative obliged by hiring a new attorney.

The real issue in *Steele v. McDonald* (2006), the one which applies in this Case, is in the letter of dissent published by one judge who did not agree with the ruling requiring a replacement attorney. His very public dissent took the other judges to task:

> "The expansive holding of the majority means that nothing can be done by a personal representative in any judicial proceeding other than via an attorney. This is not the law. Further, this holding will come as an enormous surprise to the personal representatives of estates that have been and are currently being probated and who regularly represent the estate as independent executor in judicial proceedings without being represented by counsel." [*Steele v. McDonald,* No. 10-05-00266-CV (Tex. App. Dist.10 10/18/2006)] [DS: Issue #5]

Plaintiff-Appellant has already discussed this issue with some county probate judges in New Mexico and it is clear that this group of non-parties has a stake in the outcome of this appeal.

The requirement that a fiduciary like a personal representative or a trustee retain an attorney to appear in a judicial proceeding in New Mexico is, in the words of the dissenting judge in *Steele*, not the law. This Court has the power to change the requirement, but until it does, "[t]his is not the law." [Id]

J. Personal Duty of Loyalty ¶14, pp. AB-26, AB-27

14. A Trustee's Duty of Loyalty to Trust Instructions is a Personal Duty: *Loring* contains one other noteworthy aspect of the trustee duty to the trust instructions, a duty which has been abandoned by defendant-attorneys in this Case if in fact it was ever considered by them in the first place. This is the duty of loyalty.

> The duty of loyalty is not a passive one. It requires affirmative action by the trustee, who must do all that can honestly be done for the furtherance of the interests of the trust. The trustee cannot consent to a judgment invalidating the trust nor pay a creditor who has a claim that cannot be enforced by suit. All demands must be pressed, even to the extent of bringing suit, unless it is evident that it is useless to do so. The trustee must not unreasonably fail to appeal adverse decisions. The trustee must defend the trust. If a successful action is brought by a third party against the trust, the trustee is under a duty to the beneficiary to appeal to a higher court if it is reasonable to do so. A trustee is under a continuing duty to administer the trust . . [*Loring*: §6.13, pp. 258-259]

Moreover, *Loring* states that such loyalty on the part of the trustee must be "undivided," that is not compromised in any way by competing interests of the trustee:

> Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine

> the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. [*Loring*: §6.13, pp. 252]

And further:

> "The duty of undivided loyalty springs from the trust relationship rather than from any provision of the trust instrument. It is the bedrock of the trust relationship." [*Loring*: §6.13, pp. 253]

Undivided loyalty to the written instructions of the TRUST is what the Plaintiff-Appellant as trustee presents to this Court in this pleading and others. Undivided loyalty to the written instructions of the TRUST is what the defendant-attorneys in this Case, in representing the trustee in various judicial proceedings, have demonstrably failed to provide. And undivided loyalty to the written instructions of the TRUST is what other members of the New Mexico legal community, those who have withdrawn from this Case and others who have declined to become involved, have been unable or unwilling to provide.

K. Divided Loyalty of Attorneys ¶17, pp. AB-29, AB-30

This Case, *Lee v. Catron et al.* (2007), and four other related cases filed by the trustee in the First Judicial District Court since 2002 provide ample evidence that licensed attorneys cannot always be relied upon to represent the trustee as the trustee seeks to loyally follow the instructions of a trust instrument. Several of these attorneys have been named as defendants in one or more of these related cases for their acts in violating the trust instructions, obstructing the work of the court in its consideration of the trust instrument, and in failing to inform the trustee of facts and events pertaining to the trust and the trust estate. Three prominent attorneys have, without explanation, abruptly withdrawn from representing the trustee. And a great many others have refused to get involved with claims against their bar colleagues.

Attorneys for the trustee and prospective attorneys for the trustee were evidently unable to properly represent the trustee for one or more of the following reasons: (i) failure to read, analyze and understand the TRUST instrument, (ii) failure to explain the instructions of the TRUST or to advise that such instructions be followed, (iii) failure to advise enforcement of the terms set forth in the TRUST, (iv) unwillingness to enter a case in opposition to one or more of their bar colleagues, (v) a determination that the financial returns from participating in the case were not worth the financial risks, and/or (vi) a determination that there would be negative professional consequences from getting involved.

Plaintiff-Appellant submits that the key difficulty evident in each reason is an inability to provide undivided loyalty to the TRUST. Such evidence should be reason enough to reject the suggested four-part "settlor-trustee-attorney-beneficiary" trust structure in favor of the centuries-old three-part "settlor-trustee-beneficiary" form.

L. Resolution of Trustee Standing ¶18, pp. AB-30, AB-31

18. Resolving *Pro Se* Trustee Matter Only As Attorneys' Defense is Unfair: Regardless of the outcome from the more general considerations detailed above, there is the question of whether the matter of the judicial standing of a *pro se* trustee of an express trust should be settled, as could happen in *Lee v. Catron, et al* (2007), only or predominately in order to provide a primary legal defense to attorneys who have been accused of violating and obstructing enforcement of a trust - an offense against equity.

Plaintiff-Appellant argues that such an outcome would be grossly unfair and submits that Mr. Loring, 226 Lord Chancellors, and all others previously and currently attached to the trust institution would, if they could, argue the same. Equity and good conscience must be somehow summoned by this Court to balance the rights of

these accused attorneys to submit a defense, with Plaintiff-Appellant's rights to a long-sought judicial determination of the meaning of the instructions in the TRUST and to the pursuit of claims which arise therefrom.

In *Van Auken v. Catron, et al.* (2006) this Court denied a motion to allow submission of *amicus* briefs in connection with this same matter in that case. Plaintiff-Appellant respectfully requests that this Court reconsider this decision on the basis that the participation of one or more non-parties would help to establish the necessary "balance."

The non-parties are important because, as the situation now exists the trustee and the beneficial interests of the TRUST stand opposed to a large number of members from a privileged class in New Mexico: licensed attorneys. And these attorneys have fashioned a "class defense" which requires that one of their own class validate the claims of the trustee. **[DS: Issue #6]**

M. Chisholm v. Reuckhaus, 1997-NMCA-112: P. AB-23, ¶13

The beneficiaries (of the TRUST) have no title to, power over or duty to the "property at stake and no one has suggested that they are the real parties in this Case. The *Calendar Notice* cites *Chisholm v. Reuckhaus* (1997) in which a parent brings suit on behalf of a child. In *Chisholm* the child is the real party, not the parent. As clearly set forth in argument above, in this Case the trustee is the real party. So *Chisholm* cannot apply here.

Excerpts: from pleading entered on October 27, 2008
New Mexico Supreme Court
Lee v. Catron et al. (2007)
Petition for Writ of Certiorari to the Court of Appeals of the State of New Mexico
By: Richard A. Van Auken, *pro se*

A. Property Determines Relevant Interest: pp. 11, 12

Trustees of common law express trusts can themselves be artificial entities or natural persons. The Judiciary Act of 1789 §35, 1 Stat. 73, 92 (1789) provides that "in all the courts of the United States, the parties may plead and manage their own causes personally . . . " There is similar language in 28 U.S.C. §1654. While a variety of case law such as Martinez v. Roscoe limits such "personal" pleading when for artificial entities such as LLCs, no such statutory restrictions exist for natural persons who have *pro se* judicial standing in all personal matters including those pertaining to property to which legal title is personally held. The Court of Appeals appears to agree in the attached Calendar Notice of July 23, 2008 ("We agree that Van Auken can represent himself and his interests" [CN: p.3, line 4]), but goes on to separate the interests of the Trustee from those of the Trust. The property is the interest here and the property belongs to the Trustee, a natural person with standing to "plead and manage [such] causes personally.

B. Judicial Standing of Fiduciaries in NM and TX: p. 12

While the Opinion in Lee states that fiduciary is requires licensed representation, this is not the practice in the probate courts throughout New Mexico and in the case law cited, Steele v. McDonald (TX-2006) the dissenting opinion clearly indicates that it is not the practice in Texas either. ("This is not the law . . . this holding will come as an enormous surprise to the personal representatives of estates . . currently . . in judicial proceedings without . . counsel")

Excerpts: from pleading entered on January 21, 2008
New Mexico Supreme Court
Lee v. Catron et al. (2007)
Motion for Reconsideration of Plaintiff's Petition for Writ of Certiorari
By: Richard A. Van Auken, *pro se*

c. 'Erosion of trust' is an additional unresolved public issue

Trust, once lost, is extremely difficult, if not impossible, to regain.

The *Petition* in this Case is all about trust and this Court has a duty to protect the public trust in family trust agreements, in trust and estate attorneys, in judicial procedures, and in the Court itself.

In 1979, through a valid trust instrument, two settlors (trustors) entrusted the vast majority of their family wealth (real property in Santa Fe) to a designated trustee for the eventual benefit of their offspring. At the exact moment when the surviving co-settlor passed away, a time when the entrusted assets were supposed to be transferred to the next-generation-beneficiaries, all the legal protections which licensed trust attorneys are supposed to provide were jettisoned and abused by Defendant Aubrey and her various co-defendants. The family home and land was improperly transferred by attorneys to a non-beneficiary, the new successor trustee was misadvised and abandoned, conflicted attorneys failed to request court construction of the trust instrument relying instead upon a deceitful written opinion issued by one of their number, court proceedings were obstructed, the trustee and named beneficiaries were threatened with contrived legal action, attorneys retained by the trustee abruptly quit (on two separate occasions) leaving the trustee without any representation, and other attorneys were pro-actively dissuaded from taking the case.

All of the above "extra-legal" actions damage and erode the institutional and public trust which it is the duty of this Court to protect.

Failure by this Court to issue the writ of certiorari in this Case will openly demonstrate a judicial system unworthy of public trust at a time when restoration of the public trust in state and national institutions is an extremely high priority.